

## UNINTELLIGENT DESIGN IN CONTRACT

*Peter A. Alces\**

*Scholars have expended considerable energy in the effort to “discover” a normative theory of Contract. This Article surveys that effort and concludes that something fundamental about Contract has been missed and has frustrated the search from the outset. Succinctly, Contract doctrine resists the neat formulation theory requires.*

*Theorists’ perspectives on Contract may be generalized as attempts to impute either deontology or consequentialism to the Contract law. Focusing largely on deontological constructions of Contract, this Article demonstrates the inconsistencies among the extant heuristics—promise, reliance, and transfer—and more importantly, the failure of any of those constructions to provide a coherent explanation of Contract doctrine. This failure reveals a more fundamental failure of Contract theory generally: Because doctrine is a matter of historical accident rather than “divine” inspiration, efforts to explain doctrine as an outgrowth of some coherent and fundamental purpose are necessarily unavailing, and ultimately obfuscatory.*

*Contract defies reduction into certain normative terms because Contract doctrine is an amalgam of normative inclinations. Neither pure deontology nor pure consequentialism is the source of all Contract; both rather serve as poles at the ends of a Contract continuum. This Article concludes that the search for the grail—the theory of Contract—heretofore has been misdirected. Our effort to understand Contract in normative terms should begin anew, from the premises offered here.*

When the qualifications needed to make a supposedly simple basic structure of theory give accurate results in practice reach the point where the simplicity is overwhelmed by its own qualifications, and

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\* Rita Anne Rollins Professor of Law, The College of William & Mary School of Law. I am indebted to Jason M. Hopkins, J.D., 2007, The College of William & Mary School of Law, for (once again) invaluable research assistance. Deficiencies of the finished product remain the fault of the author alone. I am also grateful to Professors Nate Oman, Michael Green, Eric Kades, Jim Dwyer, and other participants at a William and Mary law school faculty workshop for helpful comments on an earlier draft of this manuscript.

when the qualifications are not made to cohere in theory, though they do in meaning, then a fresh start becomes over-due.<sup>1</sup>

— Karl N. Llewellyn

### INTRODUCTION

There is in legal theory an apparent urge to understand one thing, Law, in terms of another, say, Morality. We are preoccupied with discovering or positing the moral foundation of law, or an area of law. That is, perhaps, particularly evident in Contract law, where theorists have expended considerable effort to formulate the legally enforceable promise and its incidents in terms of the three dominant modes of normative thought: consequentialism (primarily microeconomic theory),<sup>2</sup> deontology (rights based theory),<sup>3</sup> and Aristotelian, or aretaic, theory (virtue ethics).<sup>4</sup> There seems to be the sense that we gain something by discovering such an equation, that we better understand Contract and can also better appraise its successes and failures if we are able to formulate Contract in normative terms. Perhaps that is a pervasive human tendency, the same tendency that is illustrated by and explains the naturalistic fallacy.<sup>5</sup>

But it might be worthwhile to pause and reflect on whether we are warranted in expecting Contract to resolve in normative terms. After all, we acknowledge that Contract is about *legally enforceable* promises, and not all promises are legally enforceable.<sup>6</sup> So while it may be moral to

1. K.N. Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, 48 YALE L.J. 1, 1 (1938).

2. Peter A. Alces, *On Discovering Doctrine: "Justice" in Contract Agreement*, 83 WASH. U. L.Q. 471, 502–03 (2005) [hereinafter Alces, *On Discovering Doctrine*].

3. Peter A. Alces, *The Moral Impossibility of Contract*, 48 WM. & MARY L. REV. 1647, 1656–57 (2007).

4. See generally JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991).

5. This may be akin to the error of confusing the "is" with the "ought," which Hume identified: For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be obsrv'd and explain'd; and at the same time that a reason shou'd be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.

DAVID HUME, *A TREATISE OF HUMAN NATURE* 302 (David Fate Norton & Mary J. Norton eds., 2000). G.E. Moore extended Hume's point by positing the "naturalistic fallacy," the identification of "goodness" with a natural property. G.E. MOORE, *PRINCIPIA ETHICA* 60 (Thomas Baldwin ed., Cambridge Univ. Press 1993) (1903). The point I make here is analogous and much more modest: we should no more assume that Contract or, for that matter, any body of legal doctrine is normatively coherent than we should assume that what "is" is what "ought" to be (by whatever measure we use to determine what ought to be).

6. Professor Peter Benson correctly demonstrates the error in Lon Fuller and William Perdue's equation of all promises, juridical and, for lack of a better term, casual. See Peter Benson, *The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue*, ISSUES IN LEGAL SCHOLARSHIP, June 2001, at 29–51, (2001), <http://www.bepress.com/ils/iss1/art5/>. The law need not explain why some promises are enforceable and others are not; but the law does need to offer a normative basis for the enforceability of juridical promises. Benson, as will be developed further below, finds the basis of juridical promise enforcement in his "transfer theory" of contract. *Id.* at 31.

keep your promises, the law does not constrain you to do so. Indeed, Contract law is largely *about* that disjunction between the promise and the legally enforceable promise. Nonetheless, it remains worthwhile to consider the posited normative foundations of Contract, even if for no other reason than to deny that they exist. The focus here will be on deontological Contract theory, though the consequentialist and aretaic responses could not be ignored entirely.

The deontologists' efforts have proceeded in tandem with, or after recitation of, a governing descriptive heuristic. Contract is first conceived as either a matter of promise,<sup>7</sup> or of reliance,<sup>8</sup> or of transfer,<sup>9</sup> the implication being that identification of the appropriate heuristic accommodates development of the appropriate normative characterization. Initially you could understand the value of such heuristics as providing a test of Contract doctrine. For example, if Contract is coextensive with promise, then whenever your moral theory would tell you to honor a promise the contract must be enforced. To the same extent, if Contract is based on reliance, then enforce contracts to the extent that your failure to do so would frustrate reliance but do not enforce a contract if there has been no sufficient reliance thereon. Finally, if Contract effects a transfer, much as does the conveyance of property, treat the contract as enforceable as though the promisor has transferred a *res* to the promisee; that is, recognize that the promisee actually acquires something more than a mere expectancy when the contract forms.

Further, and this is the focus of the inquiry here, if only we knew what happens when Contract-talk pertains, then we would know how to explain Contract in normative terms. Consider, if Contract is a matter of promise, then perhaps Kantian deontology provides the key;<sup>10</sup> if Contract is based on reliance, then maybe aretaic theory explains;<sup>11</sup> and if Contract is a matter of transfer, it may be that the Hegelian justification of Contract<sup>12</sup> offers the most coherent and comprehensive explanation of extant doctrine. In response to each deontological perspective, the consequentialist, predominantly the welfare economist, is dubious.<sup>13</sup> What is the point, he asks, of discovering a "one size fits all" normative theory that we must, at least occasionally, contort to fit the result dictated by the

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7. Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021, 2033–34 (2001).

8. *Id.*

9. *Id.*

10. CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

11. GRANT GILMORE, *THE DEATH OF CONTRACT* 71 (1974) (citing commentary to RESTATEMENT (SECOND) OF CONTRACTS § 75 (Tentative Draft No. 2, 1965)). See generally P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981); LON FULLER, *THE MORALITY OF LAW* (1964).

12. See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Peter Benson, *The Unity of Contract Law*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 118, 128 (Peter Benson ed., 2001).

13. See generally Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

doctrine?<sup>14</sup> And to that skepticism the deontologist may rejoin that neither positive nor normative economic theory has provided the answers.<sup>15</sup> So, first, we must sort out the relations among the heuristics (promise, reliance, or transfer) and the theory they would support. That will be the object of Part I, largely an expository survey.

The shortcomings of the promise and reliance heuristics have been convincingly treated at length elsewhere,<sup>16</sup> and those deficiencies will not be recounted here except to clarify the distinctive contribution of transfer conceptions. However, the transfer heuristic is importantly different. Conceptions of Contract as transfer very essentially discover a normative basis of Contract in the normative conceptions of the property law. So the challenge for those who would discover the normative foundation of Contract in transfer is twofold: The transfer paradigm must fit extant Contract doctrine and must point in the same direction as the normative incidents of property law. If Contract accomplishes a transfer, much as does a conveyance of real or personal property, should not the morality of Contract mirror (or at least not contradict) the morality of property law? So conceived there is a great deal at stake in exploring the normative coincidence of Contract and property: If they diverge, there may be good normative reason for their doing so. But if we can discover no good normative reason for that divergence, are Contract or property or both normatively incoherent insofar as the terms of their doctrine are concerned? The inquiry is important because the answer may be so disconcerting.

Further, a focus on the transfer heuristic will provide a vehicle to demonstrate the limitations of normative theory in Contract generally. This, in turn, reveals what may be a more fundamental failure of the law: Doctrine is a matter of historical accident, not quasi-divine inspiration, and efforts to understand legal doctrine in terms of some coherent and fundamental purpose or object are doomed to fail. To an extent, then, this paper takes up a challenge confronting Contract in terms that may inform our conception of doctrinal coherence even beyond Contract

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14. See generally Craswell, *supra* note 13. Cf. Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 687, 696 (Jules Coleman & Scott Shapiro eds., 2002) (arguing that deontologists and consequentialists often come up with different answers because they are answering different questions).

15. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 830 (2003) (arguing that “economic analysis has failed to produce an ‘economic theory’ of contract law, and does not seem likely to be able to do so.”). See generally ERIC A. POSNER, LAW AND SOCIAL NORMS (2000).

16. See, e.g., FRIED, *supra* note 10; Benson, *supra* note 6; Richard Craswell, *How We Got This Way: Further Thoughts on Fuller and Perdue*, ISSUES IN LEGAL SCHOLARSHIP, June 2001, <http://www.bepress.com/ils/iss1/art2>; James Gordley, *A Perennial Misstep: From Cajetan to Fuller and Perdue to “Efficient Breach,”* ISSUES IN LEGAL SCHOLARSHIP, June 2001, <http://www.bepress.com/ils/iss1/art4>; Stephen A. Smith, *“The Reliance Interest in Contract Damages” and the Morality of Contract Law*, ISSUES IN LEGAL SCHOLARSHIP, June 2001, <http://www.bepress.com/ils/iss1/art1>.

law.<sup>17</sup> Just because we would like to believe that a theory of Contract (or a theory of anything) may be possible, just because it would be convenient if our heuristics could do more than they can do, does not mean that we can realistically expect more theory than reality can provide. That is the conclusion of Part II.

What remains, then, is to posit a role for theory. It may be that our reasons for wanting theory to work are valid and that we are tempted to expect more from theory than it can provide because more than occasionally theory works, so long as we take “works” to mean that theory responds in the way we need it to respond. Part III engages theory and its objects in those terms and offers a formulation of theory’s role in Contract law: What can we expect theory to do for us, and what ought we not to expect it to do? So constrained by the limitations revealed in Parts I and II, the role and limits of normative theory in Contract emerge.

At the outset, though, it is worthwhile, if not indispensable, to appreciate what it is we would want a theory of Contract to do, and therefore to disclose the value of theory. It may be that our theory of theory, if you will, gets in the way. That is, we may be motivated to find a theory, or a particular kind of theory, because we misunderstand what it is theory can do for us.

Keep in mind that theory itself is heuristic: It enables us to function more efficiently, to “leverage” some knowledge into more or more valuable knowledge. If you can correctly identify symptoms of an illness, you can better treat that illness. But if you misread the symptoms you may mistreat the malady and even exacerbate its deleterious consequences. Theory in the law works similarly. For example, once we can correctly identify a problem as a matter of Contract rather than tort, we can apply our Contract answers to reach the right results. But if we misconstrue the facts before us, and apply tort principles where we should have applied Contract, we will get wrong results, or at least results inconsistent with whatever bases we have for assuming that some questions are a matter of tort law and others a matter of Contract.<sup>18</sup> We must assume that there is a method to the madness of distinguishing the consensual (Con-

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17. For a general discussion of “doctrinal coherence,” see J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 127 (1993) (“To accuse legal doctrine of incoherence is to imagine a set of legal doctrines that might be coherent; to assert that explanations of existing doctrines are not reasonable is to appeal to distinctions and similarities that could be reasonable.”).

18. A distinction between Contract and tort is found throughout the reported decisions. See, e.g., *Garland v. Davis*, 45 U.S. 131, 144 (1846) (“Nor is the difference merely formal or technical between actions founded in tort and in contract.”); *Spence v. Omaha Indem. Ins. Co.*, 996 F.2d 793, 796 (5th Cir. 1993) (ruling that the National Flood and Insurance Act of 1968 applies only to contract claims, and not tort claims); *Evra Corp. v. Swiss Bank Corp.*, 673 F.2d 951, 957–59 (7th Cir. 1982) (discussing foreseeable damages as they apply to contract actions as opposed to tort actions); *McClure v. Johnson*, 69 P.2d 573, 576–78 (Ariz. 1937) (determining that an action for the negligent breach of a contract is an action in contract, rather than tort); *Martin v. Julius Dierck Equip. Corp.*, 384 N.Y.S.2d 479, 482 (N.Y. App. Div. 1976) (ruling that it is the responsibility of a court to determine whether the basis of a plaintiff’s case is in tort or contract).

tract) from the nonconsensual (tort) undertaking. And it is not mere happenstance that we see Contract fray when the fabric of consent is tested.<sup>19</sup>

Professor Stephen Smith has asserted that legal theory may offer four types of accounts of a body of law: (1) historical, (2) prescriptive, (3) descriptive, and (4) interpretive.<sup>20</sup> Of course, the problem of heuristic over- and under-inclusiveness<sup>21</sup> would potentially undermine any of those theoretical enterprises. We could not hold any theory to too high a standard; there will be anomalous cases. Insofar as history is a matter of cumulative and often conflicting forces, an historical theory would, arguably, have to be as broad as all of human history to be perfect. And, further, insofar as an historical theory is just one type of descriptive theory, the same could be said of any positive theory of Contract law or anything else. A prescriptive theory, though, need not be subject to the same shortcoming: You could say that Contract (or any other body of law) *should* do whatever you think it should do.

The greatest challenge, and the object which would gain the most ground, would be development of an interpretive theory:

Interpretive theories aim to enhance understanding of the law by highlighting its significance or meaning. . . . [T]his is achieved by explaining why certain features of the law are important or unimportant and by identifying connections between those features—in other words, by revealing an *intelligent order* in the law, so far as such an order exists.<sup>22</sup>

Certainly, an interpretive theory could “stack” or join multiple normative theories and still be “an interpretive theory.”<sup>23</sup> Also, it does not matter that the intelligent order actually be normative, desirable, or even (in a sense) coherent. A theory would be no less a theory because it describes how an area of law yields even normatively indefensible results. That is, it would not be incoherent to refer to a theory of Nazi genocide policies. All that matters is the reliability of the heuristic: does the theory discover an intelligent order?

Having set the interpretive bar at that level of discovery, it would seem a relatively small matter to find the right language to fill out the heuristic. But, in fact, even at a broad level of generalization, the right

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19. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.13 (3d ed. 2004).

20. STEPHEN A. SMITH, CONTRACT THEORY 4–5 (2004). According to Smith, historical accounts “reveal the law’s causal history,” while prescriptive accounts contemplate “the ideal law.” Descriptive accounts, of course, seek to describe the law as it is (or was). Interpretive theories “aim to enhance understanding of the law by highlighting its significance or meaning”; their object is to “make sense” of the law. *Id.*

21. See Alces, *On Discovering Doctrine*, *supra* note 2, at 473 (discussing the heuristic over- and under-inclusiveness of the rules and doctrine that make up areas of law).

22. SMITH, *supra* note 20, at 5.

23. See, e.g., Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, in SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY 420 (Ernest Sosa & Enrique Villanueva eds., 2001).

formula is elusive. For example, you could not even be comfortable understanding Contract as the law of consensual relations in a world of form “agreements” which are more about form than agreement.<sup>24</sup> So before you could formulate Contract in terms of “consensual” relations you need to fix a sense of “consent” that reflects Contract reality. It would be wrong to say that Contract is about nonconsensual arrangements but just as wrong to ignore the ambiguity of contractual “consent.”<sup>25</sup>

Ultimately, though, the question considered here is this: What happens when theory fails? That is, if we conclude that the extant approaches to positing a unified theory of Contract fail, what does that “failure” tell us about Contract? My thesis is that there is something fundamental about Contract that dooms searches for the unified theory to fail. But I suggest that we may learn just as much from understanding the nature and foundations of that failure as we would from discovering a unified theory. That is, so long as our object is to get at what animates Contract—what explains why, and to what extent, some promises are legally enforceable—we should be indifferent about ever discovering the grail. We have succeeded if we have discovered that there is no grail, no unified theory. Discovering *why* theory fails is a contribution every bit as valuable as would be discovering a (the?) unified theory, indeed, perhaps more so. Discovering a unified theory of Contract would certainly tell us something about Contract and *may* as well tell us something about other areas of the law—tort and property, for instance. But if we understood why Contract *resists* comprehensive theorizing then we might appreciate something about the law generally, and we might understand how tort and property could similarly defy theory. Also, if we conclude that tort and property are amenable to theorizing in a way that frustrates Contract, then we would have discovered something important that distinguishes Contract from tort or property. So there is a good deal at stake and, I argue, we heretofore may have obscured the truths to be gleaned from imagining theory-less Contract in our quest to find *the* theory.

## I. THE GOVERNING HEURISTIC

Theorists have interpreted Contract in terms of reliance,<sup>26</sup> promise,<sup>27</sup> and transfer.<sup>28</sup> There are reasons for assuming that Contract may be premised on any of the three conceptions. We want people to rely on promises so we describe an enforceable promise as one on which there

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24. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); see also Peter A. Alces, *Guerilla Terms*, 57 Emory L.J. 1511, 1557–60 (2007) (positing a role for agreement in modern contractual contexts); Brian Bix, *Background Rules, Incompleteness, and Intervention*, 2004 WIS. L. REV. 379, 386 (discussing the difficulty of finding consent in a world of form contracts).

25. See *infra* Part I.C.1.

26. See SMITH, *supra* note 20, at 169.

27. See *id.* at 168.

28. See *id.* at 171.

has been reliance (and then we can quibble about what constitutes sufficient reliance). We can recognize, of course, that it is circular to say that you may rely on a promise because promises are what it is reasonable to rely upon: “This problem concerns the difficulty of explaining why a person is entitled to rely upon a promise until it is first established that the promise is binding.”<sup>29</sup> (And if it is binding because a person is entitled to rely on it . . . .) Nonetheless, once there has been reasonable reliance—whatever it may be that makes the reliance reasonable—you can decide that promises should be enforced because it would be wrong (in deontological<sup>30</sup> or consequentialist<sup>31</sup> terms, or both) to frustrate such reasonable reliance. Reasonable reliance is something we want to encourage, so disappointed reliance should be redressed by Contract law.

An alternative to the reliance heuristic is the promise theory of Contract, presented comprehensively by Professor Charles Fried,<sup>32</sup> who argues that a contract is an enforceable promise and that Contract law vindicates Kantian conceptions of trust and respect.<sup>33</sup> Accordingly, we enforce contracts because it would be wrong, in an important normative sense, not to do so.<sup>34</sup> Fried’s theory, then, need not take account of reliance and so can understand Contract in terms of expectations (which helps us overcome the reliance-expectation damages tensions).<sup>35</sup> The other real benefit of Fried’s perspective is that it gives Contract work to do that is independent of what tort law does and provides Contract results that differ from tort results. That is, a breach of contract is something other than (if not more than) a tort. The problem is, though, that Contract seems to extend beyond the boundaries of promise. We typically draw on what we understand to be Contract principles in order to determine the parties’ Contract rights beyond the terms of their express promises.<sup>36</sup>

The transfer heuristic is a response to the reliance and promise theories. Conceiving of the formation of a contract as effecting a transfer also distinguishes Contract from tort (and so explains the difference be-

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29. ATIYAH, *supra* note 11, at 37.

30. See FRIED, *supra* note 10.

31. ATIYAH, *supra* note 11, at 30–44.

32. FRIED, *supra* note 10.

33. *Id.* at 14–17.

34. *Id.*

35. On the tension between reliance and expectation damages, see L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 YALE L.J. 52 (1936) [hereinafter Fuller & Perdue, *Contract Damages: 1*]; L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages* (pt. 2), 46 YALE L.J. 373 (1936) [hereinafter Fuller & Perdue, *Contract Damages: 2*].

36. “Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance.” RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1981); see also *id.* § 19 cmt. a (“[T]here is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others. Purely negative conduct is sometimes, though not usually, a sufficient manifestation of assent.”).

tween Contract and tort damages) and provides a means to fill in the gaps left by the promise theory. To make sense of the transfer heuristic as a means to discover the normative foundation of Contract, it is necessary first to appreciate transfer in its deontological context. Transfer is distinct from and an alternative to promise and reliance theories of Contract, which would seem, at least at first, to offer more viable alternatives if for no other reason than the fact that promise<sup>37</sup> and reliance<sup>38</sup> are embedded in the Contract lexicon. We are used to understanding Contract as a means to enforce a promise, and we understand that promises encourage reliance. So it appears almost tautological that we may discover Contract in promise or reliance principles, and that is where commentators first turned.

The subsections of this Part provide an overview of the reliance and promise theories in order to present the sum and substance of the transfer theory in relief. If the transfer heuristic convinces us that reliance and promise fail as comprehensive theories—because they do not provide a complete and coherent interpretation of Contract doctrine—then transfer must succeed or we have failed to identify a viable theoretical heuristic. So this Part recounts the premises of the reliance and promise theories and the transfer theory's response to reliance and promise. Transfer's critique of reliance and promise is convincing (indeed, we can only understand transfer if we appreciate transfer as a response to reliance and promise), and to come to terms with the power of the transfer heuristic we must start by understanding its relation to reliance and promise.

#### A. *Contract as Basis for (and Based on) Reliance*

Professors P.S. Atiyah<sup>39</sup> and Grant Gilmore<sup>40</sup> both recognize the tendency of Contract, in some settings, to merge with tort principles. Their conclusions are positive, not normative, and acknowledge that the merger is not complete. There certainly remains something of Contract that survives tort analysis, but Contract has been, so far as Gilmore could see, “fus[ed] . . . in[to] a united theory of civil obligation.”<sup>41</sup> This was not just a matter of Contract's somehow morphing into tort; on the contrary, tort law changed during the course of the last hundred years or so<sup>42</sup> as Contract law was changing, and the two seemed to arrive at a very similar place, perhaps even the same place seen from different perspectives.

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37. See *id.* § 1 (1981) (“A contract is a promise or a set of promises . . .”); *id.* § 2(1) (“A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.”).

38. See *id.* § 90 (1981) (actionable reliance); *id.* § 344 (allowing remedies for a party's “reliance interest”).

39. P.S. ATIYAH, *ESSAYS ON CONTRACT* 8–9 (1990).

40. GILMORE, *supra* note 11, at 87.

41. *Id.* at 90. See generally ATIYAH, *supra* note 11.

42. GILMORE, *supra* note 11, at 92.

Gilmore, as a positive matter, sees Contract liability as expanding to overlap with the normative foundations of tort.<sup>43</sup> Atiyah, focusing on the consequentialist—particularly utilitarian—perspective, appreciates a normative justification in reliance “from principle” even in cases of wholly executory contracts:

Promises are liable to be relied upon, and even if a promise has not yet been relied upon, it may come to be relied upon at any time. Moreover, the promisor will often not know whether the promise has been relied upon. In order to better ensure that relied-upon promises are performed, it may, therefor, be desirable to insist that even unrelieved-upon promises are performed. . . . One of the commonest ways of relying on a promise is to give other promises in turn to third parties. Similarly, with legal contracts, one of the commonest forms of action in reliance is entering into another contract with a third party which depends on the first contract. Now if promises were generally treated as only binding where they have been relied upon, but *not* where they have merely given rise to expectation, cases of this nature would raise difficulties.<sup>44</sup>

So Atiyah establishes the basis for the enforcement of even wholly executory contracts in reliance. We need to assume reliance even where reliance cannot be shown with certainty because reliance is more likely than not. Though Atiyah describes this as an argument from principle,<sup>45</sup> it seems to be more of a positive than a normative observation.

For present purposes, the important point is that reliance, a foundation of tort law, operates simultaneously as a foundation of Contract law.<sup>46</sup> There is at least ostensible doctrinal coincidence revealed by tort and Contract law’s vindication of the reliance interest, both as an element of the damages calculus and as the *raison d’etre* of the tort and Contract causes of action. Tort damages are designed to put the plaintiff in the position she would have been in but for the defendant’s negligence.<sup>47</sup> We need Contract in order that promisees may rely with some confidence on the promises made by promisors.<sup>48</sup> So Contract damages, too, could be understood as assuring promisees that their reliance will be compensated in the event the promisor breaches. It is not difficult, then, to appreciate why Contract damages ought to vindicate reliance: clearly, the promisee who reasonably relies (as we want to encourage her to do in order to maximize the value of exchange) should be protected by Contract law in the event that her reliance is frustrated. If *A* promises to provide *B* certain facilities in exchange for *B*’s promise to pay *A* therefor,

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43. *Id.* at 87–88.

44. ATIYAH, *supra* note 11, at 210–11.

45. *Id.* at 210.

46. See GILMORE, *supra* note 11, at 88–89.

47. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 2 (West Publ’g Co. 4th ed. 1971) (1941) (“[O]ne important form of remedy for a tort is . . . the restitution of what has been wrongfully taken.”).

48. Fuller & Perdue, *Contract Damages: 1*, *supra* note 35, at 53–54.

*B* would be entirely justified in expending funds to realize the full value of *A*'s engagement. Indeed, *A* would want *B* to be assured in making such expenditures in reliance so that *B* would pay *A* the greater amount to secure *A*'s promise. Both tort and Contract principles would be served if the law compensated *B* in the amount of that expenditure were *A* to fail to perform. By assuring *B* that she will be able to recover her expenditures in reliance on *A*'s promise should *A* fail to perform, the law both accommodates reasonable reliance and provides a result that enables *A* to realize greater value for her undertaking. Conceived in terms of tort, *B* would receive "out of pocket" damages (were we to understand *A*'s defalcation as tortious, both unlikely and unnecessary), what it would take to make *B* whole. In Contract, we would refer to *B*'s recovering "reliance" damages.<sup>49</sup> So Contract founded on reliance makes obvious sense.

The challenge presented by the wholly executory promise, the subject matter of Contract alone (there is nothing from tort that could intervene), may not be so obviously soluble. After all, if I promise to sell you my car and you take no action in reliance on that promise, you are not hurt—but, perhaps, for a sense of disappointment—by my renegeing. And so long as my promise is not supported by consideration, you will not be able to make out a case for breach against me without some showing of reliance, or so the Contract story goes.<sup>50</sup> So why should the result be any different, from a normative perspective, in the event you do provide wholly executory consideration? Your return promise to me, unexecuted, does not result in any loss to you in the event I do not perform. Again, at most you are disappointed, but insofar as that disappointment

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49. *Id.* at 54.

50. It is clear that Section 90, by its terms, requires reliance for a promise not supported by consideration to be actionable. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Professor Hillman's three-year empirical survey of promissory estoppel cases revealed that reliance maintains a "crucial role" in the courts' analysis. Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 597 (1998). Almost two decades earlier, Professor Knapp argued that a comparison of reliance with "such modest and familiar notions as the promise to pay a debt discharged in bankruptcy was like putting Pavarotti in a barber-shop quartet." Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981); see also Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531 (2002) (finding a more nuanced place for reliance in promissory estoppel actions).

Nonetheless, the survival of reliance as a necessary element of a promissory estoppel action is not a subject of universal agreement. Professors Farber and Mattheson conclude that "reliance is no longer the key to promissory estoppel. Although courts still feel constrained to speak the language of reliance, their holdings can best be understood and harmonized on other grounds." Daniel A. Farber & John H. Mattheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 904 (1985). Professor Feinman similarly has argued that "promissory estoppel is no longer an appropriate doctrine, given recent developments in the wider scheme of contract law and theory, and thus it is time to move on." Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 304 (1992). For similar arguments, see Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518 (1996); James Gordley, *Enforcing Promises*, 83 CAL. L. REV. 547 (1995); Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

does not have normative consequences sufficient to entail legal consequences, it is not clear why you should be able to recover. Here is where Lon Fuller and William Perdue enter the fray.

Fuller, along with his research assistant Perdue, discover a theoretical basis of Contract in the reliance interest. Their article, *The Reliance Interest in Contract Damages*,<sup>51</sup> has been described as the “most important law review article written in the United States,”<sup>52</sup> and has served well presenting the thesis with which myriad theories of Contract have parted company. Given the criticism the article has elicited, it is no small wonder that it has been recognized as such a seminal contribution. Modern commentators find little good to say about its conclusions,<sup>53</sup> but the piece is a semaphore, a signal that there is important work to be done on the normative theory of Contract and the fact that the signal may misdirect has not overcome the message that the search for direction is worth the candle.

Succinctly, and just to present summarily the premises to which later theorists have responded, Fuller and Perdue rely on Aristotelian conceptions of justice (actually, Fuller’s conceptions of Aristotle’s conceptions) to conclude that there are three “interests” vindicated by the Contract damages law: the expectation interest, the reliance interest, and the restitution interest.<sup>54</sup> Tracking Aristotle’s conclusions regarding commutative justice, Fuller and Perdue reason that Contract law cannot justly vindicate the expectation interest because affording the nonbreaching party the benefit of his bargain would be to give that party something he never had: the subject matter of the Contract.<sup>55</sup> If I promise to sell you my watch for \$100 and then breach that promise, for the law to give you that watch (specific performance) or its value (money damages

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51. Fuller & Perdue, *Contract Damages: 1*, *supra* note 35; Fuller & Perdue, *Contract Damages: 2*, *supra* note 35.

52. Gordley, *supra* note 16, at 1.

53. See, e.g., Peter A. Alces, *Contract Reconceived*, 96 NW. U. L. REV. 39, 50–51 (2001); Peter A. Alces, *Regret and Contract “Science,”* 89 GEO. L.J. 143, 148–54, 161–63 (2000); David W. Barnes & Deborah Zalesne, *A Unifying Theory of Contract Damage Rules*, 55 SYRACUSE L. REV. 495, 504–05, 520–21 (2005); Barnett, *supra* note 50, at 518–22; Benson, *supra* note 6, at 19–20, 23; Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 100, 136, 153–54 (2000); Craswell, *supra* note 16, at 3–6, 7–8; Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 499–500 (1996); Feinman, *supra* note 50, at 305–08; Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 696 (1984); Gordley, *supra* note 50, at 568–69; Gordley, *supra* note 16, at 2–3; Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1113–14, 1114 n.348 (2001); Avery Katz, *Reflections on Fuller and Perdue’s The Reliance Interest in Contract Damages: A Positive Economic Framework*, 21 U. MICH. J.L. REFORM 541, 557–58, 560 (1988); Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755, 1756; Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1199, 1228, 1251 (1998); Roy Kreitner, *Fear of Contract*, 2004 WIS. L. REV. 429, 468; Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1443 (2004); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 871, 878 (2003); Smith, *supra* note 16, at 17, 24–25; Edward Yorio & Steve Thel, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1048–50, 1073–75 (1992); Yorio & Thel, *supra* note 50, at 160–61, 167.

54. Fuller & Perdue, *Contract Damages: 1*, *supra* note 35, at 54.

55. *Id.* at 52–53.

measured by the “benefit of the bargain”) is to give you something you never had *ab initio*. All you had prior to performance—my delivery of the watch and your payment therefor—was an expectancy. So when I breached I did not deprive you of the *res*, of anything you already had in any substantial sense. All I deprived you of was an inchoate right to ownership of the watch. And insofar as the law should not operate but to avoid harm,<sup>56</sup> the Contract law should not enforce the bare promise without some showing of harm.

Professor James Gordley, an important Aristotelian scholar and theorist, takes issue with Fuller and Perdue’s reading of Aristotle.<sup>57</sup> Gordley can appreciate the argument “that the promisee has something like a property right in his ‘expectancy.’”<sup>58</sup> Because *both* promisors’ and promisees’ interests would best be served by recognizing the creation of such a right at the time of contracting, the law, consistent with Aristotelian principles, can find and enforce such a right in order to give full effect to the parties’ purposes.<sup>59</sup> So where Fuller and Perdue see the law chasing its own tail—“A promise has present value, why? Because the law enforces it.”<sup>60</sup>—Gordley (and others<sup>61</sup>) find a means to avoid that circularity by recognizing the interest of the parties—both promisee *and* promisor—in the enforceability of the wholly executory promise. So conceived, there is no clash with the harm principle.<sup>62</sup> This conclusion engages too a species of the transfer heuristic, considered below.<sup>63</sup>

Stephen Smith identifies another problem with the reliance model: it fails to account for the role of promise in Contract law.<sup>64</sup> That is, if re-

56. See Smith, *supra* note 16, at 8 (footnotes omitted):

The harm principle states that it is illegitimate for the state to interfere with an individual’s liberty unless that individual has harmed (or is about to harm) another individual. Enforcing promises qua promises is inconsistent with this principle, it is said, because a promissory obligation is an obligation to benefit another rather than an obligation not to harm another. . . . [E]nforcing promises is like enforcing an obligation to give to charity. Keeping a promise, like giving to charity, is praiseworthy—a mark of good character—but a failure to do so should not, in itself, concern the law (or at least not be of concern to the law dealing with individual’s private relations).

Smith relied on John Stuart Mill for articulation of the “harm principle.” See JOHN STUART MILL, ON LIBERTY 10–11 (David Spitz ed., 1975) (1859).

Smith also cites in this regard Joseph Raz’s review of P.S. Atiyah’s PROMISES, MORALS, AND LAW. See Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916, 937 (1982). There, Raz observed that “[i]t follows from the harm principle that enforcing voluntary obligations is not itself a proper goal for contract law. To enforce voluntary obligations is to enforce morality through the legal imposition of duties on individuals. In this respect it does not differ from the legal proscription of pornography.” *Id.*

57. James Gordley, *Contract Law in the Aristotelian Tradition*, in THE THEORY OF CONTRACT LAW: NEW ESSAYS 265, 328 (Peter Benson ed., 2001).

58. *Id.* at 328 n.279; see also Gordley, *supra* note 16, at 7.

59. Compare Hume’s argument that promises arise only from human convention: “It is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules.” HUME, *supra* note 5, at 314–15.

60. Fuller & Perdue, *Contract Damages: I*, *supra* note 35, at 59.

61. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 345 (1972); FRIED, *supra* note 10, at 16.

62. See *supra* note 56.

63. See *infra* Part I.C.

64. SMITH, *supra* note 20, at 80–82.

liance provides the sum and substance of Contract, why is it necessary that the reliance proceed from a promise made by one party to another? In the tort law—the negligent misrepresentation law specifically—the party who misrepresents a fact may be liable to the party who reasonably relies thereon.<sup>65</sup> The misrepresentation of *fact* suffices to support recovery of damages measured by the disappointed plaintiff's loss (out of pocket loss) in reliance on the misstatement.<sup>66</sup> Because the basis of liability is negligence, there is no required showing that the defendant intended to mislead. The line between breach of promise—the basis of Contract breach—and negligent misrepresentation is fine, indeed.<sup>67</sup> The questions, then, are why the law needs two conceptions of liability (both breach of Contract and negligent misrepresentation) vindicating the same normative bases, and why the damage measure for the two (expectation for Contract, reliance for negligence) should not be the same. So the reliance theory of Contract presents a conundrum: It denies Contract a justification independent of tort.

The conundrum is not resolved when you say that it is the promise which distinguishes Contract from tort.<sup>68</sup> First, of course, those who subscribe to reliance theories have denied that promise provides the answer.<sup>69</sup> At best, promise provides *a* basis for reliance, but there is nothing unique about promise that accomplishes reliance. The whole premise of negligent misrepresentation law, of fraud law for that matter, is that statements that are not promises may provoke reliance the law should protect.<sup>70</sup> Those who would find the basis of Contract liability in reliance must come to terms with the uneasy tension between the Contract and (negligent) misrepresentation actions. Second, promissory estoppel recognizes that a promise followed by reliance may be actionable.<sup>71</sup> Therefore, a promise *not* followed by reliance is not actionable on promissory estoppel grounds but is nonetheless actionable on Contract grounds so long as the promise was supported by consideration. Indeed, while the presumptive measure of damages for breach of Contract is expectation,<sup>72</sup> liability based on promissory estoppel *where reliance is requisite*<sup>73</sup> may be in the amount necessary to reimburse the plaintiff for her reliance loss.<sup>74</sup>

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65. PETER A. ALCES, *THE LAW OF FRAUDULENT TRANSACTIONS* §§ 2:21–:22 (2006).

66. *Id.*

67. See generally JoEllen Mitchell-Lockyer, *Common Law Misrepresentation in Sales Cases—An Argument for Code Dominance*, 19 FORUM 361, 389–90 (1984).

68. See *id.*

69. See Randy E. Barnett, *The Richness of Contract Theory*, 97 MICH. L. REV. 1413 (1999) (reviewing ROBERT HILLMAN, *THE RICHNESS OF CONTRACT LAW* (1997)).

70. ALCES, *supra* note 65, §§ 2:21–:22.

71. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

72. See *id.* at § 347 cmt. a (“Contract damages are ordinarily based on the injured party’s expectation interest . . .”); E. ALLAN FARNSWORTH, *CONTRACTS* 756–57 (3d ed. 1999); 11 JOSEPH M. PERILLO, *CORBIN ON CONTRACTS* § 55.3 (2005).

73. At least in theory. See *supra* note 50.

74. See *Kajima/Ray Wilson v. L.A. County Metro. Transp. Auth.*, 1 P.3d 63, 68–73 (Cal. 2000) (holding that a contractor could recover in promissory estoppel for the cost of preparing a bid incurred

If the reliance principles alone (as posited by Fuller and Perdue and rationalized by Gilmore and Atiyah) fail to offer a comprehensive theory of Contract,<sup>75</sup> insofar as reliance cannot account for the wholly executory promise, we do not supply the comprehensive theory by demonstrating that Contract is more than reliance. We need a normative theory that can account for both reliance and expectation. Here Charles Fried's contribution is apposite.

### B. *Contract as Promise*<sup>76</sup>

In his seminal *Contract As Promise*,<sup>77</sup> Fried offers "a theory of contractual obligation" that posits the normative coextensiveness of Contract with what he terms "the promise principle":

There exists a convention that defines the practice of promising and its entailments. This convention provides a way that a person may create expectations in others. By virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.<sup>78</sup>

In other words, Contract law keeps us from breaking promises that Kant would have us keep.

Fried then uses his promise principle as the measure of Contract doctrine.<sup>79</sup> After presenting the principle, he tracks its operation in terms of consideration, offer and acceptance, gaps in the contract, good faith, and duress and unconscionability.<sup>80</sup> But for Fried it all starts with the promise, and the moral force of promise provides the normative foundation of Contract.<sup>81</sup> We cannot discover that normative foundation in the benefits we realize from the Contract convention or from the reliance that promising engenders because, while "benefit and reliance are [largely consequentialist] attempts to explain the force of a promise in terms of its two most usual effects, . . . the attempts fail because these effects depend on the prior assumption of the force of the commitment."<sup>82</sup> And for that, "the force of the commitment," we need deontology rather than consequentialism.

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in reliance on the promise, but not for the expected profits from the venture); RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981); Appendix, 4 A.L.I. PROC. 98–99 (1926).

75. Professor Smith observes that no one has ever tried to formulate a comprehensive theory of Contract based on reliance. SMITH, *supra* note 20, at 78.

76. In his *Contract Theory*, Smith places discussion of Fried's promise theory before discussion of reliance, as though reliance were a response to promise rather than, chronologically, the other way around. *Id.* at 71. Smith does, however, challenge the position that promise is a necessary condition for the creation of a reliance-based duty as "difficult to defend." *Id.* at 80.

77. FRIED, *supra* note 10.

78. *Id.* at 17.

79. *See id.* at 28–112.

80. *Id.*

81. *See id.* at 7–14.

82. *Id.* at 12.

Apart, though, from promise theory's incompleteness—its inability to account comprehensively for all of the constituent rules of Contract—promise fails more fundamentally: promise necessarily entails agreement and agreement in turn entails bargain.<sup>83</sup> It would be very difficult to make much sense of a good deal (perhaps the majority) of what passes as contemporary Contract and Contract liability if one takes agreement too seriously.<sup>84</sup> Commentators have not explored in depth the theoretical challenge to Contract that evisceration of “agreement” presents.

While Smith avers that it is the objective approach that most significantly challenges promise theory, he is able to overcome the challenge, for reasons best recounted in the margin.<sup>85</sup> But I think Smith misses the bigger problem of constructive agreement when he defends the objective theory of Contract.<sup>86</sup> When “agreement” means no more than “apparent agreement” the problem is not that we are relying on the promisor's manifest intent rather than her actual intent to fix promissory liability, though that too is a problem (which I am not convinced Smith overcomes).<sup>87</sup> The greater problem is revealed by returning to the reliance-based critique offered by Gilmore<sup>88</sup> and Atiyah.<sup>89</sup> In *The Death of Contract*, Gilmore notes and formulates well the transformation of Contract into a matter of status rather than real agreement.<sup>90</sup> As Contract liability became “objectified,” freed of the detritus of subjective considerations such as “actual intent,” it became easier to resolve Contractual disputes on the basis of law rather than fact.<sup>91</sup> So “agreement” does not mean “agreement”; it means something more like “providing a defensible basis

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83. See RESTATEMENT (SECOND) OF CONTRACTS §§ 1, 2(1), 3 (1981) (indicating the interrelatedness of promise, agreement, and bargain).

84. I am here assuming that we can get past the problem, noted by Smith, that the law generally enforces agreements, but not—with few exceptions—“mere promises.” SMITH, *supra* note 20, at 63–65; see also Brian H. Bix, *Contract Law Theory* 9 (Univ. of Minn. Law Sch. Legal Studies Research Paper Series, Research Paper No. 06-12, 2006), available at <http://papers.ssrn.com/abstract=892783> (noting that much of the law of Contracts is “aimed at distinguishing enforceable bargains from unenforceable ‘mere’ promises”).

85. Smith distinguishes “the kind of intention required to make a promise and the kind of intention that matters in determining the content” of a promise:

[S]ubjective intentions are what count in determining whether a promise was made at all: a promise cannot be made without intending to make a promise. . . . [H]owever, the content of a promise is, on both the ordinary and philosophical understanding of promises, determined objectively. In interpreting a promise, as in interpreting normal communications, the aim is not to determine what the promisor intended, but what the promisor actually meant—which is determined “objectively.” If this view of promising is correct . . . the objective approach is inconsistent with promissory theories only insofar as it applies to the intention to make a contract.

SMITH, *supra* note 20, at 61–62.

86. *Id.* at 60–62.

87. Smith, *supra* note 16, at 20–21, 35.

88. GILMORE, *supra* note 11, at 65–66.

89. ATIYAH, *supra* note 11, at 66.

90. GILMORE, *supra* note 11.

91. Gilmore argued that this was the Holmesian vision: If “we can restrict ourselves to the ‘externals’ (what the parties ‘said’ or ‘did’), then the factual inquiry will be much simplified and in time can be dispensed with altogether as courts accumulate precedents about recurring types of permissible and impermissible ‘conduct.’” *Id.* at 42.

to impose Contract liability.” And what is defensible is a matter of the deontological-consequentialist tension.

The recent scholarly focus on so-called form agreements has revealed a disregard for, perhaps even impatience with, inquiries regarding subjective intent in the case of “boilerplate.”<sup>92</sup> The question is whether consumers of form contracts (who may be but are not necessarily “consumers” in the “personal, family, or household sense”<sup>93</sup>) are *as a class* better off with boilerplate terms than without them. Do the benefits of focusing on the “big picture” overcome the costs of disregarding the lack of actual agreement? It is not necessary to resolve that issue here; what matters to a promise theory of Contract is that the question is deemed pertinent at all. If it is not necessary to find a promise—in the sense of a subjectively comprehended consensual undertaking—to establish the basis of Contract liability, then a promise theory of Contract necessarily fails. While we may enlist Contract-like principles to resolve interpersonal disputes, if the premise of one of the party’s responsibility is not a conscious consensual undertaking, we are not talking about Contract in terms to which a promise theory could realistically pertain.<sup>94</sup> Fried reminds us that “[t]he moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be.”<sup>95</sup> To the extent, then, that promise theory is premised on autonomy, the enforceability of form contracts would seem to contradict any suggestion that promise can explain all of what we understand Contract to be.

We do not need to find that all courts reviewing so-called form agreements reflexively enforce them to reach the conclusion that promise is an anachronism. Even if we were to establish irrefutably that form contracts and the boilerplate they contain are ultimately “good” for those on whom they are imposed, that would not respond to the obstacle such contracts present for the viability of a promise theory of Contract. It is enough that a significant body of Contract cases (as well as established business practices and governmental regulation) is quite willing to

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92. See, e.g., Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006); Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006); Michelle E. Boardman, *Contra Preferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983 (2006); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837 (2006); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Ronald J. Mann, “Contracting” for Credit, 104 MICH. L. REV. 899 (2006); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006).

93. See generally John J.A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000) (stating form contracts account for more than ninety-nine percent of commercial and consumer transactions).

94. Cf. *Cotnam v. Wisdom*, 104 S.W. 164, 166–67 (Ark. 1907) (imposing liability on the basis of restitution where the defendant received benefits while unconscious).

95. FRIED, *supra* note 10, at 57.

find Contract liability without a promise, in any real sense. In fact, Fried himself, after a fashion, acknowledges the effect that evisceration of actual subjective intent would have on a promise theory, recognizing that filling the (inevitable) gaps in contracts entails a necessary departure from promise principles: “It would be irrational to ignore the gaps in contracts, to refuse to fill them. It would be irrational not to recognize contractual accidents and to refuse to make adjustments when they occur. The gaps cannot be filled, the adjustments cannot be governed, by the promise principle.”<sup>96</sup> If the filling of contractual gaps cannot be “governed[] by the promise principle,”<sup>97</sup> it is very difficult to see how the promise principle can account for what may be the most typical contract behavior: form contracting, where the very essence of the institution is that it is irrational to read.<sup>98</sup>

Insofar as the viability of any unitary theory is concerned, however, we encounter something in the form contract controversy that, though not unique in Contract, does get to the heart of the theoretical challenge. That is, some courts enforce boilerplate and other courts, on indistinguishable facts, refuse to do so. The reasons the conflicting courts give for their conclusions reflect diametrically opposed conceptions of what Contract is about. Consider two recent cases concerning form terms in consumer agreements: *Hill v. Gateway 2000, Inc.*<sup>99</sup> and *Klocek v. Gateway, Inc.*<sup>100</sup> *Hill* was decided three years before *Klocek* and by a higher court in the federal system. Nonetheless, Judge Vratil (*Klocek*) disagrees with Judge Easterbrook’s conclusions regarding Contract law, and their differences are not a matter of the two jurisdictions’ variations in the underlying Contract rules or dispositive differences in the factual predicates each case concerned. At bottom, their disagreement truly is of theoretical proportion.

Judge Easterbrook’s opinion in *Hill* emphasizes the efficacy and therefore the principled foundation of form contracting. The issue was whether the Hills could be bound to a term in the documents shipped to them with a computer they purchased over the phone.<sup>101</sup> The alternative to the seller’s use of the form at issue would have been the seller’s representative explaining orally over the phone to the consumer (at the time the consumer called to place the order for the computer) the sum and

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96. *Id.* at 69.

97. *Id.*

98. See Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 631 (2002) (noting that, because it is difficult for most consumers to judge the likelihood that the remote contingencies described in standard forms will occur, “the rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest”); Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 746–47 (2002) (observing that, given that the consumer expects that nothing will go wrong with the product and, if it does, that the law will provide protection from harsh terms, “the consumer has good reason not to read the form”).

99. 105 F.3d 1147 (7th Cir. 1997).

100. 104 F. Supp. 2d 1332 (D. Kan. 2000).

101. *Hill*, 105 F.3d at 1148.

substance of the consumer's rights in the event the seller's tender was in breach.<sup>102</sup> In the litigation, the Hills were trying to avoid the arbitration to which Gateway said they were bound on account of their failure to return the computer within thirty days of their receipt of it in response to their unwillingness to "agree" to the arbitration term.<sup>103</sup> This, Easterbrook concludes, would be ill-advised:

If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in rage over the waste of their time. And oral recitation would not avoid customer's assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it.<sup>104</sup> . . . Customers as a group are better off when vendors skip costly and ineffectual steps such as telephone recitation, and use instead a simple approve-or-return device. *Competent adults are bound by such documents, read or unread.*<sup>105</sup>

Easterbrook's argument is an argument from efficacy, not from Contract theory or even, it would seem, from Contract law. In his *Hill* opinion, he relies extensively on his earlier opinion in *ProCD Incorporated v. Zeidenberg*,<sup>106</sup> a decision concerning the effect of forms between (what turned out to be) businesses. Zeidenberg's argument was that the contract between ProCD and him was formed when he paid for the package of ProCD software he purchased from a retail store.<sup>107</sup> The terms contained in the box and revealed each time Zeidenberg used the software precluded his reselling the information contained on the software (essentially a nationwide telephone directory).<sup>108</sup> Nonetheless, Zeidenberg did so and ProCD brought a breach of license action.<sup>109</sup> Zeidenberg responded that he never agreed to the terms of the license.<sup>110</sup> Judge Easterbrook, in the course of offering a most dubious construction of the apposite commercial law,<sup>111</sup> opines on the value of form contracting:

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102. *Id.*

103. *Id.*

104. While it is not worthwhile to pursue this line of criticism at length here, it may be worthwhile to note that vendors who take orders over the phone have, for years, been able to and in fact have recorded conversations "for [ostensibly] training purposes." And as for Easterbrook's concern that the buyer's memory or understanding would fail, Contract law does not impose a memory requirement, only the presence of objective indicia of understanding. As to whether the fact that Contract operates in the objective rather than the subjective realm presents a problem for a promise theory of Contract, see SMITH, *supra* note 20, at 60–62.

105. *Hill*, 105 F.3d at 1149 (emphasis added).

106. 86 F.3d 1447 (7th Cir. 1996).

107. *Id.* at 1450.

108. *Id.*

109. *Id.*

110. *ProCD, Inc. v. Zeiderberg*, 908 F. Supp. 640, 645 (W.D. Wis. 1996).

111. He misunderstands the application and operation of U.C.C. § 2-204 (2003) (which deals with the *timing*, rather than existence, of an acceptance), § 2-207 (which applies even in the case of a single

Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. . . . Ours is not a case in which a consumer opens a package to find an insert saying ‘you owe us an extra \$10,000,’ and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price.<sup>112</sup>

Just to clarify the Contract law, a consumer who found such a “you owe us \$10,000” term might well be justified in thinking that the preexisting duty rule<sup>113</sup> would protect her. For Easterbrook’s analysis to work, he needs to ignore (or deny) the operation of that rule. But assume for a moment that the problem does not involve modification. What then is Easterbrook’s point in saying that “[o]urs is not a case in which a consumer opens a package to find an insert saying ‘you owe us an extra \$10,000’”?<sup>114</sup> It would seem that his analysis would not change one bit if that were the case. In either event, Easterbrook posits that the consumer’s recourse would be to return the package. But the point, of course, is what you do about the consumer who does not read any of the forms included with the packaging, does not object to the term he never saw (assuming that, as traditional Contract conceptions would provide, he is not bound by what he has not agreed to) and is sued for \$10,000. If the preexisting duty rule is read out of the Contract law (or is inapposite because you *are* bound to terms to which you have not actually agreed, at least in any meaningful objective sense) then the consumer’s failure to return the package would result, we must assume, in a judgment against the consumer for \$10,000. While that result might seem curious, at least, the important point here, recall, is theoretical: Contract liability, in the Seventh Circuit and, to be fair, beyond,<sup>115</sup> does not require substantial agreement.

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form), and § 2-606 (which concerns acceptance of contract subject matter, goods, not acceptance of offers at the formation stage).

112. *ProCD, Inc. v. Zeiderberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

113. Under the preexisting duty rule, “when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor” *Lingenfelder v. Wainwright Brewery Co.*, 15 S.W. 844, 848 (Mo. 1891); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981) (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .”).

114. *ProCD*, 86 F.3d at 1452.

115. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (upholding a forum selection clause on a cruise ticket); *Reynolds-Naughton v. Norwegian Cruise Line Ltd.*, 386 F.3d 1, 2 (1st Cir. 2004) (same); *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1296 (Fed. Cir. 2002) (upholding a forum selection clause on a form contract concerning the sale of seeds); *Adobe Systems, Inc. v. Stargate Software Inc.*, 216 F. Supp. 2d 1051, 1052–53 (N.D. Cal. 2002) (upholding a shrink-wrap agreement similar to that in *ProCD*); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 307 (Wash. 2000) (same).

Now turn to another reaction to the same fundamental Contract agreement question. In *Klocek*, United States District Court Judge Vratil confronts the same issue that Easterbrook confronted in *Hill*: the effect of an arbitration clause hidden in the plain sight of a form. The document included with the Gateway product provided that “[b]y keeping your Gateway 2000 computer system beyond five (5) days after the date of delivery, you accept these Terms and Conditions.”<sup>116</sup> Among the terms and conditions was a paragraph providing that any dispute between the purchaser of the computer and Gateway would be “settled exclusively and finally by arbitration.”<sup>117</sup> Gateway then mailed the plaintiff as well as all existing customers in the United States a copy of Gateway’s quarterly magazine, “which contained notice of a change in the arbitration policy set forth in the Standard Terms.”<sup>118</sup>

Judge Vratil understands the issue to be whether such standard terms, delivered in a “my way or the highway” form, could be part of the parties’ agreement, and begins her analysis by noting the split among the courts that had considered the issue.<sup>119</sup> After recognizing Easterbrook’s error in concluding that UCC section 2-207 is inapposite in single-form cases, Vratil applies the provision and finds that “[b]ecause plaintiff [buyer] is not a merchant, additional or different terms contained in the Standard Terms did not become part of the parties’ agreement unless plaintiff expressly agreed to them.”<sup>120</sup> That application of section 2-207, and in fact the provision’s application in nonmerchant contracts generally, certainly mirrors the common law: one cannot be subject to an agreement unless there has been agreement.<sup>121</sup> UCC section 2-207 changes that result only in the case of certain transactions involving *merchants*.<sup>122</sup> Gateway certainly agreed with that understanding of the law insofar as Gateway argued that the plaintiff-buyer had in fact manifested

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116. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1335 (D. Kan. 2000).

117. *Id.*

118. *Id.* at 1335 n.1.

119. *See id.* at 1337–38 (comparing *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (“printed terms on computer software package not part of agreement”), *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993) (license agreement shipped with computer software not part of agreement), and *U.S. Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201, 1207 (D. Kan. 1998) (single use restriction on product package not binding agreement), with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) (arbitration provision shipped with computer binding on buyer), *ProCD*, 86 F.3d at 1455 (shrink-wrap license binding on buyer), and *M.A. Mortenson Co., v. Timberline Software Corp.*, 998 P.2d 305, 312–14 (Wash. 2000) (following *Hill* and *ProCD* on license agreement supplied with software); *id.* at 1339 n.9 (citing *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369, at \*5 (Del. Ch. Mar. 16, 2000) (arbitration provision shipped with computer is binding); *Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014, at \*5 (Del. Super. Ct. Sept. 3, 1999) (warranty disclaimer included inside computer Zip drive packaging conspicuous and binding); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998) (same); *Levy v. Gateway 2000, Inc.*, 1997 WL 823611 (N.Y. Sup. Ct. Aug. 12, 1997) (same); *M.A. Mortensen*, 998 P.2d at 312–14).

120. *Id.* at 1341.

121. *ProCD*, 86 F.3d at 1450.

122. *Klocek*, 104 F. Supp. 2d at 1341.

agreement by retaining the computer beyond the five days provided by the Standard Terms in the sales documentation.<sup>123</sup> But Gateway failed to demonstrate that the buyer had ever agreed to any of the Standard Terms, including the terms that would have provided the basis to impute agreement.<sup>124</sup>

The point is, then, that the *ProCD*, *Hill*, and *Klocek* courts all understand (for different reasons) that UCC section 2-207's ability to overcome the common law and impute into a contract terms upon which the parties have not expressly agreed does not provide the means to determine what in fact the agreement was between the buyer and seller. Where the decisions diverge is between Easterbrook's understanding of what may constitute "agreement" (revealed in *ProCD* and *Hill*) and Vratil's understanding of the same fundamental Contract concept in *Klocek*. So promise theory's claim to explain very much of Contract law is frustrated: We are not even sure that promise plays any role in Contract at all. If that were not so, then Easterbrook and Vratil would have had much less reason (and ability) to offer such divergent views of the legal relations before them.

Does transfer succeed where promise fails?

### C. Contract as Transfer

The conception of Contract as a matter of "transfer," rather than reliance or promise, is most often associated with the work of Professors Randy Barnett<sup>125</sup> and, separately, Peter Benson,<sup>126</sup> each of whom have found that appreciating Contract in light of property principles provides the best justification for Contract doctrine. Barnett understands Contract as a matter of consent, in essentially libertarian terms.<sup>127</sup> Benson too sees Contract as a matter of consent, but differently.<sup>128</sup> Each must be treated seriatim.

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123. *Id.*

124. "The Court finds that the act of keeping the computer past five days was not sufficient to demonstrate that plaintiff expressly agreed to the Standard Terms." *Id.* at 1341.

125. Barnett, *supra* note 12, at 292; *see also* Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179, 184 (1986); Randy E. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy*, 97 HARV. L. REV. 1223, 1242 (1984) (reviewing E. ALLAN FARNSWORTH, *CONTRACTS* (1982)).

126. Benson, *supra* note 6, at 27.

127. Barnett writes:

The function of an entitlements theory based on individual rights is to define the boundaries within which individuals may live, act, and pursue happiness free of the forcible interference of others. A theory of entitlements specifies the rights that individuals possess or may possess; it tells us what may be owned and who owns it; it circumscribes the individual boundaries of human freedom.

Barnett, *supra* note 12, at 291.

128. Benson, *supra* note 6, at 31.

### 1. *Contract as Consent*

Barnett's theory would be more fundamental than Contract theories dependent on "concepts of will, reliance, efficiency, fairness, or bargain."<sup>129</sup> We cannot understand Contract unless we first understand "more fundamental issues, namely the nature and sources of individual entitlements and the means by which they come to be acquired."<sup>130</sup> Barnett is interested in determining when we can derive individual rights (Contract rights) from an entitlement theory, a moral theory.

Consent, for Barnett, is a "moral prerequisite to contractual obligation."<sup>131</sup> But to support his theory of Contract based on consent, he needs to develop a sense of consent that is consonant with his normative theory of entitlement. That leads him, inexorably, to an objective theory of consent. He acknowledges at the outset that "consent" would, "at first blush," seem to intimate a "will" theory of Contract.<sup>132</sup> But will theory fails to account for myriad contracts cases in which courts are enforcing the objective rather than subjective will of the contracting parties.<sup>133</sup> In the final reckoning, we must adopt an objective theory of Contract because the limits of human social intercourse leave us no alternative but to do so.

In contract law, . . . an assent to alienate rights must be manifested in some manner by one party to the other to serve as a criterion of enforcement. Without a manifestation of consent that is accessible to all affected parties, that aspect of a system of entitlements that governs transfers of rights will fail to achieve its main function. At the time of the transaction, it will have failed to identify clearly and communicate to both parties (and to third parties) the rightful boundaries that must be respected. Without such communication, parties to a transaction (and third parties) cannot accurately ascertain what constitutes rightful conduct and what constitutes a commitment on which they can rely. Disputes that might otherwise have been avoided will occur, and the attendant uncertainties of the transfer process will discourage reliance.<sup>134</sup>

Contract is animated by objective consent, then, because we cannot reliably determine subjective consent and we need to be able to determine consent in order for Contract to do what Contract needs to do to vouchsafe the system of entitlements Barnett deems crucial to human thriving. So Barnett does fashion a theory of Contract that is not dependent on the will theory, which never did seem to explain Contract very well. It certainly is difficult to reconcile subjective will with an objective theory

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129. Barnett, *supra* note 12, at 293.

130. *Id.*

131. *Id.* at 297.

132. *Id.* at 300. Barnett associates the "will theory" with Morris R. Cohen, David Hume, A.S. Burrows, P.S. Atiyah, and Charles Fried. *Id.* at 272-74 nn.7-16.

133. *Id.* at 274.

134. *Id.* at 302 (emphasis omitted).

of Contract formation. But does Barnett's objective theory of consent explain Contract well enough to make sense of extant Contract doctrine? It does not.

While Barnett's theory could work on a normative level—there is no *prima facie* reason why you *could not* argue for a construction of Contract that would serve the libertarian principles he champions—the theory is problematic on a positive level. There are just too many Contract doctrines and too many judicial constructions of Contract doctrine that gainsay consent as Barnett formulates it for us to conclude that his consent theory tells us very much that is helpful.<sup>135</sup> Consider even the most familiar doctrines: consideration and bargain.

In order to find that a promise is enforceable, it must be the case that the promisor received consideration from the promisee on account of the promise: consideration, the bargained-for exchange, or *quid pro quo*.<sup>136</sup> Although it is not difficult to find cases in which courts have enforced promises notwithstanding the ostensible failure of consideration,<sup>137</sup> there is no controversy so far as the essential doctrine is concerned: All the *consent* in the world will not take the place of consideration. No matter how much the promisor consents to be obligated in Contract to the promisee, the promisee will not be able to enforce that promise—consensually undertaken—if the promisee has not given the promisor some consideration to support the promisor's undertaking.<sup>138</sup> Barnett sees the consideration doctrine as entirely consistent with a consent theory of Contract: “The voluntary use of a recognized formality by a promisor manifests to a promisee an intention to be legally bound in as unambiguous a manner as possible.”<sup>139</sup> But he then acknowledges that “[t]he current rule that the falsity of [a statement reciting consideration] permits a court to nullify a transaction because of a lack of consideration is therefore contrary to a consent theory of contract.”<sup>140</sup> Of course that “current rule” is more than merely inconsistent with the consent theory of Contract; it undermines it altogether. If consent really defined Contract, then we would never need consideration in any form to support a promise. It would be enough for the promisor to

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135. See 1 WILLISTON ON CONTRACTS § 4:1 (4th ed. 2004) (explaining that consent “is to be judged only by overt acts and words rather than by the hidden or secret intentions of the parties”).

136. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

137. See, e.g., *Cyberchron Corp. v. Calldata Sys. Dev., Inc.*, 47 F.3d 39 (2d Cir. 1995) (treating as an enforceable promise a contractor's assurances to a subcontractor, despite the absence of consideration); *Webb v. McGowin*, 168 So. 196 (Ala. Ct. App. 1935) (enforcing a promise of lifetime support despite a lack of consideration); *Shiffman v. Atlas Mill Supply Inc.*, 14 Cal. Rptr. 708 (Ct. App. 1961) (holding the question of consideration immaterial to an executed promise).

138. 3 WILLISTON ON CONTRACTS § 7:1 (4th ed. 2004).

139. Barnett, *supra* note 12, at 311.

140. *Id.* at 312 (footnotes omitted).

say “I consent to be legally bound by my promise.” That is what the outdated law of seals effectively accomplished.<sup>141</sup>

Consideration, though, is a deal-policing mechanism, even a means for a court to avoid enforcement of a promise should that be what the court wants to do.<sup>142</sup> Further, Barnett simply cannot account for the unenforceability of gift promises. If consent is all that matters, why is the knowing and consensual promise to give a gift not enforceable? Barnett’s apparent response would seem to be that consideration serves a channeling function<sup>143</sup>: “Within a consent theory, bargained-for consideration would perform a channeling role.”<sup>144</sup> “Bargain,” he acknowledges, is sufficient to demonstrate satisfaction of that channeling function, and he cites UCC Section 2-204(1) to support his conclusion that the contemporary sales law requires only as much consideration as is necessary to find the requisite bargain.<sup>145</sup> The section provides that “[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”<sup>146</sup> But here his reliance on the UCC may be misplaced. First, the section he cites concerns what may constitute an “agreement”: the sufficient meeting of the minds *with regard to an existing bargain* that would support judicial enforcement.<sup>147</sup> The consideration and agreement requirements are separate. Agreement alone will not make a contract enforceable unless the consideration requirement is also satisfied; concomitantly, consideration alone will not suffice if there is not agreement.<sup>148</sup> If I agree to give you \$5000 and you to take it, there is not yet an enforceable promise, a contract. There is an agreement between us, but no consideration supporting my undertaking. Similarly, if I in fact give you \$5000 but you nonetheless do not give me the car you own and that I want there is no contract because you never agreed to

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141. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941) (arguing the formality of producing a seal was “a check against inconsiderate action” as well as “an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future”).

142. See *Renney v. Kimberly*, 86 S.E.2d 217, 219 (Ga. 1955) (citing a lack of consideration as justification for refusing to uphold a promise to relinquish all claim to a tract of land, when the promisor had no actual claim to the land); Fuller, *supra* note 141, at 799 (suggesting that consideration is, among other things, a way for courts to avoid enforcing poorly planned promises).

143. Barnett finds that consent is expressed by “‘channel[ing]’ one’s behavior through the use of a legal formality in such a way as to explicitly convey a certain meaning—that of having an intention to be legally bound—to another.” Barnett, *supra* note 12, at 310. Barnett cites Fuller, who notes that legal formality “offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention.” Fuller, *supra* note 141, at 801.

144. Barnett, *supra* note 12, at 313. In support of his conclusion, Barnett quotes RESTATEMENT (SECOND) OF CONTRACTS § 75 cmt. a (1981): “Since the principle that bargains are binding is widely understood and is reinforced in many situations by custom and convention, the fact of bargain . . . tends to satisfy the cautionary and channeling functions of form.”

145. Barnett, *supra* note 12, at 313.

146. U.C.C. § 2-204(1) (2003).

147. *Id.*

148. See RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

give me the car in exchange for the money. No court would force you to give me the car, though I should be able to get my money back. What is lacking is the coincidence of agreement and consideration; one without the other just will not do.

The reason the Code provision Barnett cites, section 2-204, seems to subsume the consideration requirement is because it relies on the word “sale”—“a contract for the *sale* of goods.”<sup>149</sup> That term is separately defined in article 2 in a manner that makes clear its relation to consideration. Where there has been a sale there has been consideration: “A ‘sale’ consists in the passing of title from the seller to the buyer for a price.”<sup>150</sup> “Sale,” then, *means* an exchange of consideration. So section 2-104’s reference to “agreement” does not supplant the common law consideration requirement, as Barnett intimates; instead, it clearly incorporates it. To the extent that Barnett relies on article 2 of the Code to support the positive aspect of his consent theory of Contract, his argument is infirm.

Barnett then turns to reliance to find his consent perspective immanent in the Contract law’s deference to reliance when consideration fails: “Expenditures made by a promisee in reliance on the words and conduct of the promisor may prove as much about the nature of this transaction as the existence of consideration, especially where the reliance is or should be known to the promisor.”<sup>151</sup> Of course only reliance of which the promisor is aware can provide the basis to enforce the promisor’s promise, or so section 90 of the Second Restatement provides.<sup>152</sup> Barnett finds sufficient consent from reliance of which the promisor is aware.<sup>153</sup> There is not much to quibble with here. It may well be that reliance, knowingly cultivated, can serve the same function as consideration; indeed, it may be that such reliance is an even more accurate indicator of the parties’ actual consent. There is something more obviously normative about a rule that protects someone who has relied on a promisor’s statement when the promisor intended to elicit just that type of reliance than is the case when more formal consideration supports the promise. While adequacy of consideration is not determinative (though sufficiency is<sup>154</sup>), there is an ethical (and equitable) tug at the fabric of Contract when a promisee tries to enforce a promise supported by sufficient but inadequate consideration.<sup>155</sup>

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149. Barnett, *supra* note 12, at 313.

150. U.C.C. § 2-106 (2003).

151. Barnett, *supra* note 12, at 314.

152. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

153. See Barnett, *supra* note 12, at 276.

154. See, e.g., *City of St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69, 115 (1879) (“It is not necessary that a consideration should be adequate in point of value to make it sufficient.”); *Emberson v. Hartley*, 762 P.2d 364, 366 n.2 (Wash. Ct. App. 1988) (distinguishing between adequacy and sufficiency of consideration).

155. In equity, adequacy of consideration is sometimes deemed pertinent and determinative. See, e.g., *Newman v. Freitas*, 61 P. 907, 908 (Cal. 1900) (“[W]hile there was a consideration *sufficient* to support the contract at law, yet there was no *adequate* consideration, and that consequently a court of

But a problem remains for Barnett if he wants to demonstrate that consideration and promissory estoppel serve the same consent function in Contract, and it is a problem identified by Professor Williston at the time of the promulgation of the First Contracts Restatement. Recall the famous colloquy between Williston and Frederick Coudert.<sup>156</sup> For present purposes it does not matter that Coudert's view ultimately prevailed in the Second Restatement's iteration of the Promissory Estoppel doctrine,<sup>157</sup> what matters is Williston's fundamental observation concerning the relationship between consideration and reliance theories of Contract:

Either the promise is binding or it is not. If the promise is binding it has to be enforced as it is made. As I said to Mr. Coudert, I could leave this whole thing to the subject of quasi contracts so that the promisee under the circumstances shall never recover on the promise but he shall recover such an amount as will fairly compensate him for any injury incurred; but it seems to me you have to take one leg or the other. You have either to say the promise is binding or you have to go on the theory of restoring the *status quo*.<sup>158</sup>

Insofar as Barnett finds that consideration and reliance theories of Contract are coextensive, that both vindicate consent, he needs to find some explanation in Contract law to distinguish the damage calculi for each. If both consideration and reliance provide bases to enforce promises because they both indicate consent, why would Contract law distinguish the damage measures in the event the expectations generated by those indicia of consent are frustrated? For present purposes it would not be necessary to decide that expectation rather than reliance (or reliance rather than expectation) should be the measure. But it would be incongruous to say that both consideration and reliance vindicate consent but the damages for a contract based on one (reliance) are fluid in a way that they are not if based on the other (consideration). In fact, if both reliance and consideration support consent it may be that both should support damages "as justice requires," a calculus reserved for

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equity would not specifically enforce it.") (emphasis added); *Carter v. Grossnickle*, 11 Ohio N.P. (n.s.) 465, 1911 WL 864 at \*8 (Com. Pl. 1911) ("The question is not whether the consideration of one dollar is *sufficient* to sustain the deed, but whether that consideration is an *adequate* consideration to induce or warrant a court of equity to decree specific performance.") (emphasis added).

156. Appendix, 4 A.L.I. PROC. 98-99 (1926).

157. In the Second Restatement, promissory estoppel is defined as [a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). The First Restatement version read:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

RESTATEMENT OF CONTRACTS § 90 (1932). For a discussion of the development of these sections, see Yorio & Thel, *supra* note 50.

158. Appendix, A.L.I. PROC. 101-03 (1926).

promissory estoppel cases.<sup>159</sup> Barnett does not appreciate that discontinuity and his consent theory may be mistaken, or at least incomplete, therefore.

Barnett concludes in terms that seem to stretch extant Contract doctrine that “the absence of either bargained-for consideration or reliance will not bar the enforcement of a transfer of entitlement that can be proved in some way—for example, by a formal written document or by adequate proof of a sufficiently unambiguous verbal commitment.”<sup>160</sup> This might be the result of devising Contract in Barnett’s consent terms, but it is not Contract as we know it. It would fail to make sense of a good deal of Contract doctrine. So, ultimately, to come to terms with Barnett’s theory of Contract, we must conclude that he is not so much offering a construction of Contract as it is, a positive theory of Contract, as he is proposing a vision of Contract as it would be were we to take his consent theory as seriously as he would have us take it.

## 2. *Contract as Res*

Peter Benson offers a more nuanced and, in its way, creative theory of Contract to support the transfer heuristic he develops to make normative and positive sense of the law of enforceable promises.<sup>161</sup> While his theory can tell a more convincing positive story of Contract, a coherent normative theory still proves elusive. It is worthwhile first to consider Benson’s approach to Contract as a response to earlier theories. A discussion of the merits of his transfer heuristic follows.

### a. Responses to Reliance Theories

Benson’s thesis is that we can understand Contract if we conceive of Contract in terms of the transfer of a *res* at the time of Contract formation.<sup>162</sup> He develops his theory in response to Fuller and Perdue’s reliance theory which, recall, could not rationalize the expectation measure of damages.<sup>163</sup> If the basis of Contract is reliance, as Fuller and Perdue would have it, but the standard award to disappointed promisees is measured by the expectation interest, then Contract is theoretically incoherent. So Fuller and Perdue explain Contract by concluding that, although the Contract doctrine refers to the recovery of expectation damages, a review of the cases reveals that the expectation measure is nothing more than compensation for the frustrated reliance interest in disguise.<sup>164</sup> While courts might think that they are providing the plaintiff

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159. *Contra* Barnett, *supra* note 12, at 317.

160. *Id.*

161. Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673 (2007).

162. *Id.* at 1673–74.

163. *See* Fuller & Perdue, *Contract Damages: 1*, *supra* note 35, at 52–53.

164. *Id.* at 61.

the benefit of her bargain, in fact they are compensating the plaintiff on a reliance basis but using the language of expectation to camouflage empirical uncertainties in determining the reliance measure.<sup>165</sup>

Rather than take issue with Fuller and Perdue insofar as their reading of the cases is concerned, Benson finds in Contract doctrine support for his conception of a contract's effecting an instantaneous and very substantial transfer that is complete when there is agreement.<sup>166</sup> Each party transfers to the other an immediate right immediately, so if there is a breach, the nonbreaching party has been divested (not merely deprived) of something that she had at the instant of contracting, no matter the executory nature of the "exchange."<sup>167</sup> Now this conception of what happens upon contracting is crucial insofar as it supports the award of expectation damages in a way that Fuller and Perdue's application of aretaic theory could not.<sup>168</sup> For Benson, the award of expectation damages does not give you something you never had; instead it compensates you on account of something that has been taken *from* you: the right to your counterparty's performance of her promise.

Crucial to Benson's theory is his equation of the transfer effected by formation of a contract with "a present [physical] transfer of property."<sup>169</sup> Again, conceptions of consent are central: "First, the transfer must embody or express the decision of the initial owner to part with his or her property."<sup>170</sup> In Benson's view, from the moment of contract formation the promisee has an *in personam* right against the promisor that is every bit as choate as the *in rem* right a transferee would have against her transferor following physical delivery of the *res*. He concludes:

The promisee's so-called right to the promisor's performance reflects, then, a transfer of ownership at the moment of formation. It is a right that is at once personal and proprietary in character. Indeed, its specific proprietary nature is inseparable from its being a right *in personam*. Understood in this way, a right *in personam* is no less proprietary than a right *in rem*. The fact that contract formation gives the promisee a right to performance does not, I conclude, make the logic of transfer inapplicable to contract.<sup>171</sup>

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165. The principal point of Fuller and Perdue's second installment is that "the contractual reliance interest receives a much wider (though often covert) recognition in the decisions than it does in the textbooks." Fuller & Perdue, *Contract Damages: 2*, *supra* note 35, at 418.

166. Benson, *supra* note 161, at 1722.

167. *Id.*; Benson, *supra* note 12, at 137.

168. Benson concludes:

If we must suppose that contract formation consists in a transfer of entitlement from one party to the other—as is necessary if the expectation principle is to function as a principle of compensation—the . . . analysis of a transfer of ownership in the case of an executed conveyance of property should also apply to contract.

Benson, *supra* note 12, at 132.

169. *Id.* at 128.

170. *Id.*

171. *Id.* at 137.

Benson's conception of what happens at the instance of contract formation—a real *transfer* with the consequences we associate with the transfer of a physical *res*, that is, a transfer within the purview of property law principles—supports his theory of Contract generally and informs his understanding of Contract. His transfer heuristic, then, does a good deal of both normative and positive heavy lifting. And because he is able to use that heuristic to explain Contract law, particularly to overcome the expectation damages problem that preoccupied Fuller and Perdue, Benson's theory is able to make sense of Contract where those who endorsed promise and reliance theories could not. Benson accomplishes this by specifying “a conception of entitlement for contract that is suitably transactional and complete at the moment of the parties' *consents*.”<sup>172</sup> This provides Benson a perspective from which to appraise the promise and reliance theories, and reveal their deficiencies.

The reliance theories fail because they do not appreciate that damage to the promisee's expectation interest is real: insofar as the promisee received something of value at the instant of contract formation, breach deprives the promisee of something she already had, *not* merely something she hoped to obtain. Benson engages Fried, Professor T.M. Scanlon, and Professor James Gordley and finds that each of those commentators' responses to Fuller and Perdue fail, where Benson's transfer heuristic succeeds.<sup>173</sup>

Fried fails, as far as Benson is concerned, because he shows only “that the promisor's duty to perform is a duty of virtue, not a juridical obligation of right.”<sup>174</sup> Fried's perspective is Kantian, and so may be able to provide a fairness basis supporting the disappointed promisee's right to recover but, because it is not rights-based, lacks the means to vindicate a particular measure of recovery, i.e. expectation rather than reliance. It is one thing to find that the nonbreaching party has a *right* to recover as a matter of fairness; it is wholly another to find some reason why that right should be measured by expectation rather than reliance. Because Fried's Kantian perspective cannot answer that more difficult measurement question, it cannot respond to Fuller and Perdue in terms that support the Contract law. Benson does not so much take issue with the moral basis of Contract Fried provides as he does point out that Fried's moral conception does not justify the expectation measure rather than the reliance measure Fuller and Perdue argue should attend breach.<sup>175</sup>

According to Benson, Scanlon,<sup>176</sup> provides a moral argument in support of enforcing promises but fails to provide the basis to support the

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172. Benson, *supra* note 161, at 1680 (emphasis added).

173. *See id.* at 1681–93.

174. *Id.* at 1682.

175. *See id.* at 1681–83.

176. T.M. Scanlon, *Promises and Contracts*, in *THE THEORY OF CONTRACT LAW: NEW ESSAYS* 86 (Peter Benson ed., 2001).

expectation measure of damages.<sup>177</sup> Promisors and promisees would want a means to provide “assurance” to one another that the promisor will do what the promisor says he will do.<sup>178</sup> That is in the interest of both parties.<sup>179</sup> Concomitantly, both are better off if the law provides a means—beyond a fear of moral opprobrium—to motivate fulfillment of promises. So both parties, Scanlon argues, have an interest in the law’s providing the sanctions to support the assurance.<sup>180</sup> That could not be reasonably rejected by either promisor or promisee, and so has a moral foundation. And, of course, it is easy enough for people to avoid legal sanction for breach of contract: they can avoid entering into contracts or breaching them once they have done so.

Again, Benson does not quibble with the moral basis of contracting Scanlon posits as responsive to the Fuller and Perdue reservation. Benson simply does not believe Scanlon has found what he needed to find, the basis of expectation rather than reliance damages:

The possibility of such a relation, which makes the thing assured something that belongs in a juridical sense to the promisee just in virtue of the promise and prior to the moment of performance, remains unexplained in this account. Failing to perform what has been assured can quite reasonably and intelligibly be viewed as failing to confer a benefit which the promisee expects and upon which he or she may rely. This does not, however, show that what is promised is acquired by and belongs to the promisee just on the basis of the other party’s promise, thus allowing breach to be viewed as an interference with a present asset from which the promisee can by rights exclude the promisor.<sup>181</sup>

Thus Benson can find nothing in Scanlon’s moral argument that responds to the deficiency in Fuller and Perdue’s conclusion and so nothing that can save Contract, insofar as vindication of the expectation interest by the award of expectation damages defines Contract.

Gordley<sup>182</sup> too, in Benson’s estimation, fails to respond to Fuller and Perdue in the terms Benson deems necessary.<sup>183</sup> Gordley’s response to Fuller and Perdue is based, first, on the Aristotelian virtue of liberality, giving “to the right people the right amounts and at the right time.”<sup>184</sup> Benson is not convinced:

This requires evaluating and weighing the motives, purposes, and relevant circumstances of the donor, the needs and moral worthi-

177. Benson, *supra* note 161, at 1683–88.

178. *Id.* at 1684.

179. Eric Posner analyzes this idea in the context of charitable gifts in *Altruism, Status and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567.

180. Cf. HUME, *supra* note 5, at 314–15 (arguing that promises are only enforceable because society enforces them).

181. Benson, *supra* note 161, at 1687.

182. Gordley, *supra* note 57.

183. Benson here responds to Gordley, *supra* note 57.

184. Benson, *supra* note 161, at 1690 (quoting Gordley, *supra* note 57, at 297).

ness of the donee, presumably the value and the ethical significance of alternative uses of the benefit including the legitimate interests and needs of third parties, and so forth. The aim of this exercise is to determine whether and to what extent a given promise qualifies at a given point in time as an act of liberality.<sup>185</sup>

Benson concludes that there is nothing in the idea of an act of liberality that forecloses the promisor's changing his mind some time between promise and promised act. Further, liberality does not entail a bilateral relationship of promisor and promisee. Liberality "specifies a state of *inward* moral character that is expressed in external acts."<sup>186</sup> Liberality does not involve relation to another, as Contract does.

Benson then turns to Gordley's *apologia*<sup>187</sup> for Contract in terms of commutative justice, which necessarily contemplates a relational structure.<sup>188</sup> The object of commutative justice, as a virtue, is to assure equality in bilateral transactions: "The parties to [contracts of exchange] exercise the virtue of commutative justice by exchanging resources that are equivalent in value."<sup>189</sup> So if the expectation measure of damages effects commutative justice, Gordley—through Aristotle—will have discovered the normative and positive foundations for Contract that Fuller and Perdue missed. But Benson is not sanguine.

If commutative justice focuses on equality of exchange, it must come to terms with the *res* exchanged in order to do the justice calculus. That is, by focusing on exchange equivalence, Gordley ignores the predicate issue: What has been exchanged at the time of contract formation which must be compensated for in the event of breach? Benson puts the problem in terms of the relationship between promise and performance:

In Gordley's discussion, the intelligibility of promise as a mode of transferring rights remains unexplained from the standpoints of both commutative justice and liberality. Although promises may instantiate, be consistent with, or instrumentally further liberality and commutative justice, these virtues are specified and justified independently of any analysis showing how promises can be understood as rights-acquiring or rights-alienating acts and therefore how the parties' voluntary interaction can constitute a transfer of rights between them.<sup>190</sup>

Benson believes that Gordley must demonstrate how the promise can effect a transfer of rights from promisor to promisee in order for commutative justice to be of much help. Otherwise the ball just is not advanced; commutative justice is merely a means to rephrase the enigma, not to overcome it.

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185. *Id.*

186. *Id.* at 1691 (emphasis added).

187. *Id.*

188. *See id.*

189. Gordley, *supra* note 57, at 307.

190. Benson, *supra* note 161, at 1692.

Benson's critique of the reliance and promise theories is quite valuable. He exposes what is lacking in the dominant phases of Contract theory and points out quite clearly where the gap is between extant theories and Contract doctrine focused, as it is, on expectation damages as compensatory. Benson recognizes what is at stake: the very reason for enforcing promises the way our legal system does so.<sup>191</sup> To appreciate the cogency of Benson's critique is to appreciate the theoretical infirmity of Contract, conceptualized in promise and reliance terms. But that appreciation comes at great cost: If Benson's transfer theory is not able to fill the gap his critique exposes, Contract would remain theoretically incoherent unless we are prepared to accept that incoherence (in some way) is a sufficient theory on its own.

b. Benson's Transfer Theory of Contract

For Benson's theory of Contract to work it must rationalize Contract doctrine, else it could be no more than a theory such as Barnett's, which describes what Contract *would be* in Barnett's perfect world but which diverges from Contract reality so substantially that it cannot help us understand Contract as it is, either as a positive or normative matter. Benson recognizes the challenge his "theory" must meet in order to be a viable theory (without the quotation marks).<sup>192</sup> And so his argument turns to fundamental Contract doctrine and offers an explanation therefor in terms of his transfer heuristic. Benson focuses on offer and acceptance, consideration, and unconscionability.<sup>193</sup> If he can read those doctrines in a manner consistent with his transfer theory, he has advanced the inquiry. For present purposes, it suffices to engage Benson's conclusions about Contract formation.<sup>194</sup>

On the subject of offer and acceptance, Benson begins by recognizing the objective nature of the assent required for offer and acceptance,<sup>195</sup> and that an offer may be revoked until it has been accepted because it is not until acceptance that the transfer effected by agreement has been ac-

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191. See *id.* at 1674.

192. "[W]e treat the doctrines [of Contract law] just as provisionally fixed points for working out a conception of contract and we begin with them because no better or more natural starting point offers itself for the purposes of a public basis of justification." Benson, *supra* note 12, at 138. By "public justification," Benson means "the mode of justification and reasoning that is appropriate to settle the fair terms . . . of interaction and cooperation among persons." *Id.* at 124 n.12.

193. It would seem that Benson would also have to reconcile the generally substitutional rather than specific nature of Contract damages too, but he has not done that, yet. He has, though, acknowledged that "complete argument for this claim requires that we show how all the significant doctrines and principles of contract law fit within this conception." Benson, *supra* note 161, at 1731 n.90. My reaction to Benson does not focus on the doctrines he has not yet chosen to explain; it confronts the conclusions he has reached in the exegesis he has offered so far.

194. Treatment of Benson's approach to the unconscionability doctrine must be left for another day, though nothing he says about unconscionability undermines the analysis and conclusions here.

195. "[T]he reasonably construed expression of assent in and of itself, not the thought process that produced it, is the operative factor in formation." Benson, *supra* note 12, at 139.

completed.<sup>196</sup> Benson makes much of the absolute revocability of an offer prior to acceptance:

The impact of performance on the well-being of the parties is, in itself, wholly irrelevant to the question of formation. This indifference to particular interest and advantage as such is reflected in the (contractually) unfettered liberty of a party to revoke an offer before it is accepted or to decline, for whatever reason, to make an offer in the first place, irrespective of the impact which such decisions may have on the other party's well-being. In and of itself, the fact that my interests or welfare will be adversely affected by your decision does not give me a claim—or even the beginning of a claim—in contract against you.<sup>197</sup>

Now it is difficult to make perfect sense of what Benson means by the limiting parenthetical, “contractually,” or by the final “in contract.” Does he mean to exclude from his sweeping conclusion the operation of rules such as those formulated in sections 45<sup>198</sup> and 87<sup>199</sup> of the Restatement (Second) of Contracts? Section 45 describes when an option contract, essentially an *irrevocable* offer, will arise to avoid the hardship of the so-called unilateral contract “trick.” Because of Section 45, I cannot offer to pay you \$500 if you cross (actually cross, not merely promise to do so) the Brooklyn Bridge and then attempt to withdraw my offer just before you complete the trek. In fact, though, I have only *consented* to be liable to you for the \$500 if you complete the crossing, but the law (if not the Contract law then what?<sup>200</sup>) provides that you may bind me beyond the limits of my express consent and seems to do so on account of the fact that your “interests or welfare [would] be adversely affected” were I permitted to withdraw the offer after you have begun “the invited performance.”<sup>201</sup>

It is true, of course, that the result accomplished by section 45 is subject to the parties' manifestation of a contrary intention.<sup>202</sup> But that alone would not seem to respond to what may be a gap in Benson's argument. He does not acknowledge the limits of his absolute consent rule in terms that are considerate of section 45. While he recognizes that the absoluteness of the consensual offer and acceptance rule is qualified by

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196. “[T]here is in law a liberty to revoke an as yet unaccepted offer.” *Id.* at 140.

197. *Id.* at 143.

198. “Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.” RESTATEMENT (SECOND) OF CONTRACTS § 45(1) (1981).

199. “An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.” *Id.* § 87(2).

200. Indeed, the title of Section 45 is “Option Contract Created by Part Performance or Tender” (emphasis added).

201. Benson, *supra* note 12, at 143.

202. RESTATEMENT (SECOND) OF CONTRACTS § 45, cmt. b (1981) (“The rule of this Section . . . yields to a manifestation of intention which makes reliance unjustified.”).

deal-policing mechanisms,<sup>203</sup> he emphasizes that the offer and acceptance rule assures that an agreement that may be *voidable* is not *void ab initio*:

[S]o far as offer and acceptance goes, the voluntary acts necessary for contract formation can exist even where an agreement is voidable. And that is precisely why, so long as there are offer and acceptance, the parties can decide to affirm their agreement even in the face of mistake or unwanted circumstances.<sup>204</sup>

But the rule of section 45 turns that presumption of enforceability around: the only way to assure that my consent to be bound is by your actual performance, rather than your mere initiation of performance, is to reserve a power to revoke after performance has begun. Were section 45 consistent with Benson's conception of the role of consent in Contract, the rule of the provision would be just the opposite: a presumption that complete performance is required to enforce promise. But section 45 imposes liability beyond the parties' consent in order to take into account the promisee's "interests or welfare."<sup>205</sup> The comments explain that the section "is designed to protect the offeree in justifiable reliance on the offeror's promise."<sup>206</sup> It is difficult to reach any other conclusion about the intended operation and effect of the provision. This also foreshadows a likelihood that any theory of Contract that ignores justifiable reliance must be incomplete, and it is difficult to find much reliance in Benson's transfer theory.

Similarly, Restatement section 87 essentially elaborates on the rule of section 45 and extends it to the situation where there has not been part performance, where there has been no more than an offer which Benson's theory would need to deem revocable. So long as the offeror is aware that her offer "should reasonably . . . induce action or forbearance of a substantial character on the part of the offeree before acceptance and [the offer] does induce such action or forbearance" the offer "is binding as an option contract *to the extent necessary to avoid injustice*."<sup>207</sup>

Now Benson could probably respond to the first challenge section 87 presents in the same way he might to section 45: the two provisions are in fact the ostensible exceptions to the consent requirement that prove the rule. The two provisions reverse the normal irrevocability rule just in case the offeror *should be understood* to have consented to the very "deal" the provisions impose on him. The reason why the provisions impose that rule does not matter so much as the predicate to their doing so: the offeror in fact consents to the irrevocability of the offer because by making the offer *in that particular way* she consents to the irrevocability of the offer. The consent foundation remains unscathed.

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203. Benson, *supra* note 12, at 142 n.32.

204. *Id.* at 142.

205. *Id.* at 143.

206. RESTATEMENT (SECOND) OF CONTRACTS § 45, cmt. b (1981).

207. *Id.* § 87(2) (emphasis added).

The first problem with that response would be that once consent can be so constructed *post hoc*, it loses a good deal of its theoretical force. That is, consent becomes a conclusion rather than an analytical tool. Consent so construed means no more than what Benson wants to avoid its meaning: the basis to impose Contract liability on general fairness grounds.<sup>208</sup> But Benson's theory requires that "contract formation [be], by its very nature, independent of whether transactions are to the overall advantage or benefit of one or even both of the parties."<sup>209</sup> Sections 45 and 87 make clear that Contract law, at the offer and acceptance formation stage on which Benson's analysis focuses, is very much concerned with "overall advantage or benefit . . . of the parties."<sup>210</sup>

Second, while the entire object of Benson's consent-based transfer analysis is to save Contract law from the corner into which Fuller and Perdue's reliance theory painted it, section 87's damage measure undermines expectation. If we can find the requisite consent even when we impose a result to take account of the "overall advantage or benefit . . . of the parties" then you would think that such consent would entail Contract law's expectation consequences.<sup>211</sup> But section 87 abjures the expectation measure insofar as it provides that the offer is binding "to the extent necessary to avoid injustice."<sup>212</sup>

Third, and finally, it is disingenuous to parse the Contract doctrine as Benson would have us do to discover a role for consent that is just not there in the way Benson suggests that it is. Contract doctrine is not just the simple offer and acceptance formation rules unadorned by corollaries such as sections 45 and 87. To have a comprehensive theory of Contract we need to account for the rules as well as the refinements to the rules that apply to particular cases. If Benson's theory cannot do that, he really has not taken us much further than Fried did, offering a partial explanation of some of Contract doctrine while ignoring the fuller fabric of the object of our study.

Benson also recognizes the central role that consideration plays in the Contract doctrine and in his discussion of consideration encounters again, but again does not acknowledge, the clash between consideration and premises Benson would consider more distributive in nature: "The consideration must be given in response to the promisor's request and as quid pro quo for the promise. *It is not enough that the promisee's act or promise is reasonably foreseeable to the promisor.*"<sup>213</sup> Of course it is

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208. Benson, *supra* note 161, at 1680.

209. Benson, *supra* note 12, at 143. Benson concludes that "[t]he doctrine of offer and acceptance seems at its core to be indifferent to the very kinds of considerations that centrally concern distributive justice." *Id.* Benson does address, obliquely, the "idea of estoppel," but his treatment of the doctrine does not clarify how he would respond to the challenge presented by sections 45 and 87. *See id.* at 146 n.35.

210. *Id.* at 143.

211. *Id.*

212. RESTATEMENT (SECOND) OF CONTRACTS § 87 (1981).

213. Benson, *supra* note 161, at 1713 (emphasis added).

enough that “the promisee’s decision . . . is reasonably foreseeable to the promisor.”<sup>214</sup> That is the sum and substance of the promissory estoppel<sup>215</sup> basis of promise enforcement, which may be indistinguishable from the consideration basis of promise enforcement.

Benson anticipates that objection and responds in terms that attempt to distinguish promise- from reliance-based liability, but does so in a way that may undermine defense of his consent-based transfer theory:

The fact that in reliance-based liability the inducement and reliance must be temporally successive but cannot also be simultaneous means that such liability is incompatible with an essential premise of the logic of a transfer of ownership. It cannot possibly satisfy the requirement of continuity. Accordingly, it is impossible to conceive the one who *relies as acquiring an entitlement to the thing promised or represented*. . . . Thus, there can be no intrinsic connection between reliance-based liability and the expectation principle, taken as a principle of compensation.<sup>216</sup>

What Benson seems to miss here is the fact that a court finding the bases of Restatement section 90<sup>217</sup> promissory estoppel liability is not constrained to award the disappointed promisee no more than reliance damages.<sup>218</sup>

The promisee may recover what “justice requires,”<sup>219</sup> including, we may assume, expectation damages. So if Benson has discovered the means to vindicate the award of expectation damages in promise-based consideration cases, he has undermined the award of expectation damages in reliance-based cases. That is, there is nothing endemic to promise-based cases that supports expectation damages; reliance-based liability may just as well support expectation damages. And because Benson makes clear that reliance-based liability is not premised on transfer,<sup>220</sup> there is nothing about expectation recovery that requires transfer, or even, it would follow, the consent component of his transfer thesis. So in the course of trying to reconcile the alternative basis of Contract liability,

214. *Id.*

215. See RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981). Benson acknowledges that “[w]hat is often referred to as ‘promissory estoppel’ has all the markings of the principle of detrimental reliance applied in a contractual setting.” Benson, *supra* note 12, at 176.

216. Benson, *supra* note 12, at 175.

217. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

218. See, e.g., Goldstick v. ICM Realty, 788 F.2d 456, 463–64 (7th Cir. 1986) (advocating a “value of the promise” approach to damages in a promissory estoppel setting); Chedd-Angier Prod. Co., Inc. v. Omni Publ’n Int’l, Ltd., 756 F.2d 930, 936–37 (1st Cir. 1985) (applying section 90 of the restatement to affirm the lower court’s award of “full contract damages”); Daigle Commercial Group, Inc. v. St. Laurent, 734 A.2d 667, 674–75 (Me. 1999) (“A promise binding under [promissory estoppel] is a contract, and full-scale enforcement by normal remedies is often appropriate.”) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981) (alteration in original)).

219. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

220. Benson notes that “[r]eliance-based analysis cannot view the promise or representation as one side of a transfer of rights between the parties.” Benson, *supra* note 12, at 175.

promissory estoppel, with his consent-based transfer theory, Benson compromises his thesis, profoundly.<sup>221</sup>

Benson also points to the preexisting duty rule as further support for his transfer thesis because the “rule requires that an act or promise given by a promisee as consideration must not have been already provided as consideration in a prior binding agreement between the parties.”<sup>222</sup> He concludes that “[t]he rule reflects a conception of contract as a transfer of right.”<sup>223</sup> Indeed, the rule might well fit Benson’s thesis if our interest and endeavor were only to make sense of the rule in its classic form rather than as elaborated in the doctrine. Contract law recognizes sufficient exceptions<sup>224</sup> to the preexisting duty rule to put into question any description of doctrine that would need to ignore them in order to maintain internal integrity.

The foregoing description of Benson’s transfer theory, both as the basis of a critique of the reliance theories and an interpretive theory in its own right, is sufficient to demonstrate the boxes into which the extant theories would put Contract, and how they would do so.<sup>225</sup> My reactions to Benson and the others reveals my disquiet with such theoretical efforts. I do not believe that Contract will reduce to the terms that any of the extant theories provide. Before elaborating on the conclusion that flows from that realization, it is necessary to appreciate another aspect which the theoretical confusion engendered by transfer theory reveals. If

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221. It should be clear that Benson’s argument is similarly compromised to the extent that we can discover promise-based liability in which a measure of recovery other than expectation is awarded. That would, for example, include *Paola Gas Co. v. Paola Glass Co.*, 44 P. 621 (Kan. 1896) and *Griffin v. Colver*, 16 N.Y. 489 (N.Y. 1858), which Fuller and Perdue cite as illustrating the difficulty in calculating damages in cases where the defendant’s breach results in the plaintiff’s property remaining idle. While the former case found damages in the plaintiff’s lost use of his property (a reliance calculation), the latter found the appropriate measure to be the loss of profits which would have been made had the defendant performed his promise (an expectation calculation). See Fuller & Perdue, *Contract Damages: I*, *supra* note 35, at 75.

222. Benson, *supra* note 12, at 177; see also RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981) (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .”).

223. Benson, *supra* note 12, at 179.

224. These include a novation, the receipt of additional consideration, changed or unforeseen circumstances, and invocation of statutes such as U.C.C. § 2-209, which permit modification without additional consideration. U.C.C. § 2-209 (2003). Additionally, contracting parties may circumvent the rule’s application by simply agreeing to do so. FARNSWORTH, *supra* note 19, §§ 4.21–22.

225. I have not here treated Benson’s conceptualization of the unconscionability doctrine in terms that would confirm his consent-based transfer theory. Suffice it so say that Benson needs to find (and so finds) that unconscionability may be articulated “in terms of the parties’ presumed intentions.” Benson, *supra* note 12, at 187. While a thoughtful response to his argument would require more than marginal treatment, the pithy response would suggest, once again, that he may have to distort the doctrine (or, at least present it less than completely) in order to formulate it in terms that support his analysis. For Benson, unconscionability is about equivalence of exchange; certainly equivalence matters, but there is just more to it.

U.C.C. § 2A-108, for example, permits courts to avoid as unconscionable contracts to which consumers are party wholly on procedural rather than substantive grounds. Also, in order to most coherently appreciate the role of unconscionability, it may be necessary to more fully engage the operation of the other deal policing mechanisms, most notably impracticability, frustration, and mistake.

Contract may be understood by reference to the transfer heuristic, should not operation of the Contract and property doctrine lead ineluctably to the same results?

## II. THE CLASH OF CONTRACT AND PROPERTY

In *The Morality of Property*,<sup>226</sup> Professors Thomas Merrill and Henry Smith find a persistent moral thread that runs through and unifies property law, a thread that cannot be explained in consequentialist terms. They conclude that a deep but perhaps not wholly accessible deontology explains both our reactions to recurring controversies involving property contests as well as the courts' (and legislatures') responses to property disputes.<sup>227</sup> Whether their conclusions, even as a positive matter, are or are not assailable, for present purposes it suffices to understand their project as an effort to formulate what fundamental deontological premises support familiar property law concepts. It is necessary to describe the general parameters of their argument in order to appreciate its contribution to the object of this article: to discover the possibility of a theoretical basis for Contract.<sup>228</sup>

Merrill and Smith observe that it would be unlikely for legal protection of property to be out of step with what they describe as "common morality."<sup>229</sup> So it would be unlikely that we would encounter property law that conflicts with such common moral conceptions. From that we may infer that property law,<sup>230</sup> properly understood, would reflect common morality.<sup>231</sup> Thus we could discover that common morality by surveying the decisions and statutes that resolve property contests.<sup>232</sup>

226. Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

227. *Id.* at 1855–57, 1870–90, 1894–95.

228. And this possibility, keep in mind, is framed in terms of the success of the extant theories.

229. Merrill & Smith, *supra* note 226, at 1854.

230. All law?

231. Though it is curious that at the outset of their article, the authors say that "[a]n institution assumed to be wholly dependent on law for its existence is unlikely to be infused with strong moral content." Merrill & Smith, *supra* note 226, at 1849. There seems to be some tension between the two statements. If law is understood as serving certain coordination, expertise, and efficiency functions, see LARRY ALEXANDER & EMILY SHERWIN, *THE RULES OF RULES* 232 n.4 (2001), then there is no reason to believe that the fact of an institution's dependence on law could not "be infused with strong moral content." The morality may just be latent, which, of course, is a matter of perspective.

232. A corollary of Merrill and Smith's proposition is that "when legal protection of property is out of sync with common morality, we often see widespread disregard of legally recognized property rights." Merrill & Smith, *supra* note 226, at 1854. They offer downloading of copyrighted material from the web as an example of this. *Id.* They could certainly also have used photocopying of music without payment to composers as another example of the same phenomenon. While it is not clear that downloading and such photocopying reveals morality—it may rather reveal more about ignorance of copyright laws—what matters is their point that law is impotent to overcome the common morality, at least over time. If they are correct then we may discover a common morality by reviewing the law in practice and be sure that that common morality is venerable. They may also be only partially correct (common morality may only resist without actually defying law) and their point would still be an important one, insofar as it tells us where to look for the morality of law.

The authors also conclude that “[w]hatever their source, property rules and the moral rules that support them must be simple and general, at least as to the core of property.”<sup>233</sup> But that simplicity is not so much a function of the morality as it is a limitation imposed on the morality by human intellectual, perspectival, and, perhaps, perceptual capacities. For a morality to be “common” it must be accessible.<sup>234</sup> You get the sense that for Merrill and Smith, there is almost something visceral about the relative inviolability of property vouchsafed by the common morality, something on the same order as “possession is nine tenths of the law,” or “a man is the king of his castle.”

It would even seem that the common morality Merrill and Smith discover would withstand convincing consequentialist argument to the contrary; certain moral rights are “sticky.” While we might acknowledge some system whereby polluters can pay for a right to pollute, “[a] right to pollute sounds morally offensive, in part because our default entitlements track moral rules under which causation is not reciprocal.”<sup>235</sup> And that mindset would obtain even when it is made clear to the common citizen that there would, in fact, be less pollution were we to imagine and provide for the “right to pollute.”

Merrill and Smith’s conclusion, or at least the operating principle that animates their study, is that “property is critically dependent on simple moral intuitions about the importance of protecting possession against unwanted invasions.”<sup>236</sup> That is, indeed, quite simple, but they provide illustrations to support the conclusion. They offer first the case of *Jacque v. Steenberg Homes, Inc.*,<sup>237</sup> in which the Wisconsin Supreme Court upheld an award of \$100,000 in exemplary damages on account of a trespass that resulted in no physical harm whatsoever to the plaintiffs’

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233. *Id.* at 1857.

234. The proposed futures market in terrorism, funded by the Pentagon “in the belief that it might help predict the probability of future terrorist attacks,” certainly did not achieve a common moral acceptance. Peter Wayner, *Predict the Future? You Can Bet on It*, N.Y. TIMES, Oct. 2, 2003 at G5. However, the market’s lack of acceptance seems to derive more from a failure of public relations and education than from a common moral objection. *See id.* Thus, it is not immediately clear why morality must be generally accessible in order to be a common morality. The true moral foundation of an institution may be latent or opaque, at least so far as the masses are concerned. There would not seem to be anything in moral theory that requires a normative explanation to be patently obvious. *Cf.* Merrill & Smith, *supra* note 226, at 1851 (“[T]he type of morality that will support a system of property rights must be suitable for all members of the community.”) Again, though, Merrill and Smith’s normative conclusions, for present purposes, need not depend on their accessibility conclusions.

235. Merrill & Smith, *supra* note 226, at 1865. The causation is “not reciprocal” in the sense that we do not think of both the polluter and the victims of the pollution as being, together, causes of the pollution problem. Merrill and Smith are responding here to an economic perspective “under which the polluter has the ‘entitlement to pollute’ that the resident can take upon payment of the polluter’s cost of abatement or shutting down.” *Id.* (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1116 (1972)). For a similar economic perspective, see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

236. Merrill & Smith, *supra* note 226, at 1866.

237. 563 N.W.2d 154 (Wis. 1997).

real property.<sup>238</sup> The Jacques were, in fact, wholly unreasonable when they denied the brief access to their property that the defendant requested.<sup>239</sup> But the court does not care: The Jacques are entitled to their unreasonable beliefs no matter how inefficient their decision to exclude the defendant might be.<sup>240</sup> The court cares only about the deontology, not the consequences, as the portion of the opinion Merrill and Smith reproduce reflects: “[W]hat is to stop [defendant] from concluding, in the future, that delivering its mobile homes via an intentional trespass and paying the resulting Class B forfeiture, is not more profitable than obeying the law?”<sup>241</sup> The common morality of property law, then, as revealed in *Jacque*, champions a visceral sense of rights over consequences.

Now you might think that the normative significance of *Jacque* would be undermined by cases that seem less indulgent of the rights to possession for the right to possession’s sake. Consider the recent United States Supreme Court decision in *Kelo v. City of New London*,<sup>242</sup> in which the Court recognizes a city government’s right to exercise the power of eminent domain to promote economic development, to take from private citizen *A* and give to private commercial entity *B* solely for the sake of increasing the economic value of the property after the confiscation.<sup>243</sup> The law, after all, supported the very taking that Merrill and Smith argue is inconsistent with the common morality of property law.

But the Court’s conclusion in *Kelo* is not so much the story as is the public response to the decision, at least so far as formulating the common morality of property is concerned:

*Kelo* elicited unprecedented public opposition to the idea of takings of private property for economic development. This public backlash, when translated into the actions of legislators, local public officials, and state and lower federal courts, will probably have a greater impact on the future use of eminent domain than the Court’s decision in *Kelo*. Certainly for our purposes, we can take the anti-*Kelo* position to be a more accurate statement of general sentiment about property rights than the opposition position.<sup>244</sup>

Notwithstanding “the perfectly plausible utilitarian case”<sup>245</sup> for the taking in *Kelo*, Merrill and Smith discern an overwhelming public resistance to such action: “The basic moral intuition is the same as that which says [as in *Jacque*] intentional trespass or theft is wrong.”<sup>246</sup> “Coercion of the innocent”<sup>247</sup> is just wrong, full stop. While there may be perfectly plausible

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238. *Id.* at 166.

239. *See id.* at 157.

240. *See id.* at 160.

241. Merrill & Smith, *supra* note 226, at 1873 (quoting *Jacque*, 563 N.W.2d at 161).

242. 545 U.S. 469 (2005).

243. *Id.* at 477.

244. Merrill & Smith, *supra* note 226, at 1880.

245. *Id.* at 1882.

246. *Id.*

247. *Id.* at 1883.

consequentialist arguments supporting the *Kelo* taking and the *Jacque* trespass, costs outweighed by benefits, the public will have none of it and so the moral dimension of the property law rejects it out of hand. Merrill and Smith conclude as well that the property law's general impatience with bad faith actions reflects this same moral conclusion.<sup>248</sup> There is an immanent normative foundation of the property law that is reflected in *Jacque*, proscription of bad faith behavior, and the public outcry following *Kelo*.

Though it may be that some could take issue with Merrill and Smith's conclusion about the venerability of the moral foundation they describe,<sup>249</sup> for present purposes we need only agree that Merrill and Smith tell a plausible story about the morality of property, a story that is certainly not out of line with popular perceptions and that resonates with the property law as they describe it. The challenge for Contract theory, particularly Contract theory based on the transfer heuristic, would be to demonstrate consonance between the property rules and the analogous Contract rules. That is, if Benson and Barnett as champions of the transfer theory are going to be able to explain Contract as a transfer of an existing *res*, then we would expect that the result in Contracts and property controversies would align. But that is just not the case.

Superimpose Contract over the relationship between the parties in *Jacque*: Imagine that the Jacques and the defendant had entered into a contract pursuant to which the Jacques promised to pay the defendant \$50 in return for the defendant's promise not to take a certain path across the Jacques' property for the next month. (For present purposes it does not matter what precontract right, if any, the Jacques had to restrict the defendant's access to the property.<sup>250</sup>) So we have a contract-based exchange of promises: in exchange for *A*'s agreement not to do *X*, *B* will pay *A* \$50. If *B* pays *A* the \$50, then the contract is partly executed but the promise of *A*, not to cross the property at the designated point, is executory, and will not be fully executed until the month lapses. (Of course, *A* and *B* may instead agree that *B* will not pay *A* the \$50 until the end of the month; the order of their performance does not matter.)

In the event *A* crosses *B*'s property before the end of the designated month, *A* will be liable to *B* in an amount equal to *B*'s expectation interest: the amount necessary to provide *B* the benefit of her bargain with *A*. If a court finds that the value of that expectancy is \$50, then *B* will be

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248. Merrill and Smith point to "trespasses, bad faith adverse possession, takings for economic development, and nonviolent property crimes." *Id.* at 1894. For an argument that the Contract law is similarly intolerant of bad faith behavior, see David Morris Phillips, *The Commercial Culpability Scale*, 92 *YALE L.J.* 228 (1982) (arguing that a scale of scienter explains the U.C.C.'s allocation of risk of loss).

249. Price controls at one time seemed to make sense, until we learned that they resulted in more rather than less consumer hardship.

250. It could, for example, be the case that the Jacques had already rented a portion of their property to the defendant and then agreed to refund \$50 of that rental in order to keep the defendant from crossing a particular portion of the property.

able to recover the \$50 from *A*. But if the court determines that the value of the expectancy is only \$25, *B* will recover only \$25. Similarly, if the value of the expectancy is \$100, *B* will recover \$100. There is nothing talismanic about the \$50, though it may provide the court evidence of the value of the expectancy.

But we need not focus on the hypothetical in order to demonstrate the divergence between the property morality revealed by *Jacque* and Contract “morality.” The collision is made manifest by the analysis and result in two venerable pillars of Contracts case law: *Jacob & Youngs v. Kent*<sup>251</sup> and *Peevyhouse v. Garland Coal & Mining Co.*<sup>252</sup> The facts of each case are familiar to students of Contract law and the conclusions reached by each court reflect the prevailing Contract doctrine.<sup>253</sup>

In *Jacob & Youngs*, the plaintiff agreed to build a residence for the defendant, but failed to use the brand of pipe, “Reading,” specified in the contract.<sup>254</sup> When the plaintiff brought an action against the defendant for the balance of the price under the construction contract, the defendant resisted, arguing that because the plaintiff’s tender had not been perfect, the defendant was not obligated to pay for the structure as completed.<sup>255</sup> In his opinion, Judge Cardozo refuses to find a sufficient failure of condition to relieve defendant of his obligation to pay.<sup>256</sup> All the judge can find was a breach of promise. The difference between the two, condition and promise, determines the result. While a failure of condition would result in a forfeiture—plaintiff would recover nothing from defendant—mere breach of promise results only in damage liability. Insofar as the replacement of Reading pipe with the alternative but not inferior product did not impair the value of the finished building, the defendant could resist the plaintiff’s payment demand.<sup>257</sup>

Judge Cardozo casts his opinion in terms that resonate with the kind of common morality Merrill and Smith found in *Jacque*:

Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another [promise or condition]. . . . There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor had been expended is incapable of surrender . . . and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacri-

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251. 129 N.E. 889 (N.Y. 1921).

252. 382 P.2d 109 (Okla. 1963).

253. See RESTATEMENT (SECOND) OF CONTRACTS § 229 (1981) (“To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.”).

254. *Jacob & Youngs*, 129 N.E. at 890.

255. *Id.*

256. *Id.* at 891.

257. *Id.* at 890.

face of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of intention. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable . . . .

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. . . . The courts have balanced such consideration against those of equity and fairness, and found the latter to be the weightier.<sup>258</sup>

Cardozo's language is the language of common morality, at least insofar as that conception has traction for Merrill and Smith.

It is clear from the *Jacob & Youngs* opinion that the defendant had, indeed, specified Reading Pipe.<sup>259</sup> So it would not be correct to conclude that Cardozo's conclusion turns on the defendant's failure to sufficiently specify the goods he had in mind. All that may have been missing was, perhaps, the defendant's stating "and I mean it" after insisting on Reading Pipe in the contract.<sup>260</sup> No, the reason Cardozo found breach of promise rather than failure of condition was to avoid a forfeiture, to do some equity. The conscientious student of that portion of the Contract law concerning the distinction between promises and conditions<sup>261</sup> will recognize that in the characterization issue there is room for a court to do equity, and that equitable calculus owes nothing to a transfer analysis.

We can reach a similar conclusion when we consider another venerable pillar of Contracts jurisprudence that confronts a forfeiture-like question: May the nonbreaching party recover damages measured by cost of repair if that amount would greatly exceed damages measured by the value of the defendant's performance? The issue is a familiar one, and perhaps nowhere better illustrated than in *Peevyhouse v. Garland Coal & Mining Co.*<sup>262</sup>

In *Peevyhouse*, the defendant mining company entered into a contract with the plaintiff pursuant to which the defendant was to have the right to extract minerals from the plaintiff's land in exchange for the payment of a royalty and for defendant's promise to restore plaintiff's property to its pre-extraction condition at the end of the lease term.<sup>263</sup> The estimated cost of restoration was \$29,000 but restoration would result in only a \$300 increase in the value of the property.<sup>264</sup> The court refused to order restoration: "[W]here the economic benefit which would

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258. *Id.* at 890–91.

259. *See id.* at 890.

260. *See id.* at 891 ("This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery.").

261. *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 224–230 (1981); Richard Lord, 3 WILLISTON ON CONTRACTS § 7:18 (4th ed. 2004).

262. 382 P.2d 109 (Okla. 1962).

263. *Id.* at 111.

264. *Id.* at 112.

result to lessor by full performance of the work is grossly disproportionate to the cost of performance, the damages which lessor may recover are limited to the diminution in value resulting to the premises because of the non-performance.”<sup>265</sup> The opposite Restatement (Second) provision formulates that rule.<sup>266</sup>

Now there may be good reasons why a lessor would want lease property restored to its prelease condition upon termination of the lease term,<sup>267</sup> just as there may be good reasons why someone might want Reading pipe when another brand of pipe would do just as well.<sup>268</sup> It does not matter to the point here that such good reasons might exist and maybe had not been emphasized sufficiently by the nonbreaching party or that those reasons as stated by the nonbreaching party had not convinced the court. All that matters for present purposes is the fact that *Jacob & Youngs* and *Peevyhouse* undermine any equation between the “transfer” of promises in those cases and the “transfer” policed by *Jacque*.

In *Jacque* it did not matter that the Jacques were being unreasonable. The common morality of the property law vindicated just such unreasonableness. As Merrill and Smith explain, “[r]easonable persons would have quickly agreed on a temporary license as a solution to the problem; the Jacques were not reasonable persons. But the court obviously believed that did not matter; the question of comparative utilities simply was irrelevant to the analysis.”<sup>269</sup> By contrast, reasonableness means everything in *Jacob & Youngs* and *Peevyhouse*. Reasonableness is the measure of the promise’s exchange.

So it is difficult to find room for *Jacobs & Young/Peevyhouse* and *Jacque* in the same transfer paradigm. The morality of the rules is just not reconcilable. If transfer explains one it does not explain the other. What could that mean for Contract theory, and theorizing about what theory can accomplish?

### III. THE LIMITS OF CONTRACT THEORY

The object of theory must be to explain; theory must leave us with more understanding, even if that just amounts to understanding in different terms. The promise, reliance, and transfer heuristics, were they viable, would provide us the means to appraise the coherence of Contract

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265. *Id.* at 114.

266. RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 348(2)(b) (1981) (setting the standard measure of damages as loss in value and allowing for damages based on cost of completion only “if that cost is not clearly disproportionate to the probable loss in value”).

267. *Id.* § 347 cmt. b (reflecting that loss in value must sometimes be determined based on the value of performance “to the injured party himself and not [its value] to some hypothetical reasonable person or on some market”).

268. *Id.*

269. Merrill & Smith, *supra* note 226, at 1872–73.

doctrine. We could predict how doctrine might develop as transactional patterns evolve and we could appraise applications of doctrine, both statutory and common law. We would have a means to decide whether a particular resolution was consistent with our theory of Contract, consistent with our sense of what it is Contract is designed to do. Without theory we would be somewhat adrift, lacking the moorings to support reliable judgments about the integrity of an instance of Contract law's application.

When we reach a conclusion about Contract's coherence or integrity, we are necessarily deciding whether the one thing, here, Contract doctrine, makes sense in terms of another, here our common moral conceptions. Because the result in *Kelo* departed from the common morality of property Merrill and Smith had discovered in cases such as *Jacque*, Merrill and Smith could explain the negative popular reaction to the *Kelo*. That is, the law of *Kelo* did not make sense given the common morality of property, so something would have to give. Because you could not make sense of *Kelo* in terms of the morality of property, one could not be coherent in terms of the other. For Merrill and Smith what had to give was the law of *Kelo*, and they describe legislative reactions to *Kelo* in just those terms.<sup>270</sup>

Similarly, we could not coherently posit a normative theory of Contract if we cannot discover the Contract morality in *Jacob & Youngs* and *Peevyhouse*. If Benson were correct and the contractual promise effects a transfer akin to a transfer of property,<sup>271</sup> then we would expect the result in *Jacque* to be consistent with the result in *Jacob & Youngs* and *Peevyhouse*, but the case results are irreconcilable; the same moral sense could not be informing the result in the cases. *Jacob & Youngs* and *Peevyhouse* are incoherent in the moral terms of *Jacque* and the other manifestations of property morality discovered by Merrill and Smith.

The foregoing, though, would only demonstrate that Benson's property transfer heuristic cannot account for fundamental aspects of Contract doctrine. It would not establish that Contract theory is necessarily incoherent by reference to any other measure. The other extant heuristics—reliance and promise—though, do no better, and, as was demonstrated above, cannot explain enough of Contract to stand as theories of Contract. At best, they explain some Contract rules and results and mark the limits of what Contract theory can accomplish.

The question remains, though: Is there a latent theory, some way to make sense of the one thing, Contract, in terms of the other, morality, and do so in a way that will accomplish the prediction and explanation tasks we would want theory to accomplish? There is room for skepticism.

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270. *Id.* at 1880 & n.42.

271. See Benson, *supra* note 161, at 1725–31.

An obstacle is the nature of heuristics generally. They are necessarily over- and under-inclusive, much like all rules.<sup>272</sup> A heuristic by its very nature truncates information in the course of translating the terms of the data (*i.e.* Contract law) into the heuristic (*i.e.* promise, reliance, transfer). Heuristics are rules of thumb, designed to accommodate the processing of data, and given the properties of heuristic reduction—discrimination<sup>273</sup> and leverage<sup>274</sup>—something gets lost “in the translation,” as it were. All heuristics fail us from time to time, and that is no less true of moral<sup>275</sup> heuristics than it is of perceptual<sup>276</sup> or rational<sup>277</sup> heuristics. So it is not surprising that no Contract heuristic—promise, reliance, or transfer—could be perfect. That is, it would be fair to describe anomalous decisions as “wrong,” a departure from the correct theory (after all, that is what *Kelo* was, Supreme Court decision or not).

We can reach one of two decisions when extant heuristics, theories of Contract, fail: Either the theory is wrong (as promise concludes that reliance is and as transfer concludes they both are) and we just have not yet found the right theory or combination of theories, or, the more problematic alternative, there is something about Contract doctrine that resists such theory.

A response to the first possibility—that the right theory is out there we have just not *yet* found it—has been offered by Professor Jody Kraus, who would stack the deontological and consequentialist<sup>278</sup> to find the theory that works.<sup>279</sup> As I have demonstrated elsewhere,<sup>280</sup> that approach does not so much solve the theoretical dilemma as shift the locus of the question: Instead of asking whether deontology or consequentialism better explains Contract, we would ask which is more fundamental. The answer remains the same—it depends—and is not particularly helpful.

Related to that first response may be the idea that there is nothing about Contract, or any bundle of data, that *must* as a matter of metaphysical or physical imperative resolve into the something else that we

272. See Alces, *On Discovering Doctrine*, *supra* note 2, at 473.

273. “Discrimination refers to our ignoring portions of data that can be ignored without impairing its message . . . (reducing the size of the data pattern to make it more manageable).” See *id.* at 505; STEPHEN WOLFRAM, *A NEW KIND OF SCIENCE* 549 (2002).

274. “Leverage” refers to our ability (or propensity) to focus on regularities without becoming distracted by the particulars that are not pertinent to the perceptual or analytical exercise. See Alces, *On Discovering Doctrine*, *supra* note 2, at 505; WOLFRAM, *supra* note 273, at 549–52.

275. See generally CASS R. SUNSTEIN, *BEHAVIORAL LAW & ECONOMICS* (2000); Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556 (2004).

276. See generally HOWARD MARGOLIS, *PARADIGMS & BARRIERS* (1993) [hereinafter MARGOLIS, *PARADIGMS*]; HOWARD MARGOLIS, *PATTERNS, THINKING, AND COGNITION* (1987) [hereinafter MARGOLIS, *PATTERNS*].

277. See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

278. The theoretical world seems to nicely and necessarily devolve into that dichotomy.

279. Kraus, *supra* note 14, at 687.

280. Alces, *supra* note 3, at 1662–66.

would have do the heuristic work. That is, there may just not be (at least, yet) a theoretical (heuristic) construct that would do the work we want a Contract theory to do.<sup>281</sup> There might even be something a tad arrogant about our assuming that there must be such a construct or that it would be accessible to us.<sup>282</sup> We may have, in other words, set for ourselves an impossible object. That would not make the quest meaningless—we may be able to learn some valuable things along the way—but it would be frustrating, at least.

There is, though, a second response, not wholly unrelated to the ostensible near nihilism just suggested: Contract may be best understood as an amalgam of normative inclinations, with pure deontology and pure consequentialism as poles at the ends of a continuum. Further, the point on that continuum occupied by a particular aspect of doctrine, or rule, may be a function of the rule-fact dynamic. So conceived, a three-dimensional structure emerges that may be contrasted with the two-dimensional structure that, I submit, best describes the current effort to match theory with doctrine.

That too would be consistent with and would in fact reveal something about the necessary plasticity of Contract doctrine. The reason efforts to impose a normative heuristic on Contract fail is not because the normative heuristics are necessarily incoherent: We could certainly imagine a body of Contract law that tracks promise, reliance, or transfer conceptions. The problem, as demonstrated above,<sup>283</sup> is that Contract is not as simple as it would need to be for the heuristic to work as well as we would need it to work, which is well enough to support normative conclusions.

The extent to which a heuristic “works” is, of course, a matter of degree of acuity.<sup>284</sup> Certainly Contract is more *like* a promise or a transfer of something than it is like an athletic event, jigsaw puzzle, or a crime. The problem is that Contract is not *enough* like a promise or transfer to enable us to make sufficient sense out of Contract in terms of promise or transfer. The problem is one of fit, which is ultimately the problem confronting all heuristics.

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281. Cf. BRIAN GREENE, *THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY* (First Vintage Books ed., Vintage Books 2000) (arguing that the limits of the human imagination are the primary obstacle in formulating an ultimate theory of astronomical physics).

282. Perhaps the appropriate answer awaits the proper question. In one sense, then, “the Answer . . . [i]s . . . 42”—but we can’t fathom the question. DOUGLAS ADAMS, *THE HITCHHIKER’S GUIDE TO THE GALAXY* (First Ballantine Books ed., The Ballantine Publishing Group 1980).

283. See *supra* Part I.

284. Perceptual discontinuity and idiosyncrasy invite the creation of generalized rules of thumb, “which on the whole have led to good results but in certain situations lead to errors.” MARGOLIS, *PATTERNS*, *supra* note 276, at 13. For a physicist’s perspective, see MURRAY GELL-MANN, *THE QUARK AND THE JAGUAR* 29 (1994) (“[W]hen defining complexity it is always necessary to specify a level of detail up to which the system is described, with finer details being ignored. Physicists call that ‘coarse graining.’”).

Exacerbating the problem is the very nature of Contract (and perhaps all legal) doctrine: It is not designed to track any particular normative perspective. Further, Contract is not just a mix of the deontological<sup>285</sup> and the consequentialist<sup>286</sup>; it is often—in fact, usually—cast in terms that accommodate either perspective as well as subiterations within both perspectives.<sup>287</sup> Because the dominant perspectives, deontology and consequentialism (and aretaic theory, too, for that matter), often

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285. Much of the Second Restatement, for example, is cast in deontological terms. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS (1981). For example, § 86, “Promise for Benefit Received” (“extent necessary to prevent *injustice*”); § 94, “Stipulations” (“if the modification is *fair* and equitable”; “to extent that *justice* requires enforcement”); § 139, “Enforcement by Virtue of Action in Reliance” (“The remedy granted for breach is to be limited as *justice* requires.”); § 158, “Relief Including Restitution” (“grant relief on such terms as *justice* requires”); § 173, “When Abuse of a Fiduciary Relation Makes a Contract Voidable” (contract voidable unless “it is on *fair* terms”); § 176, “When a Threat is Improper” (“threat is improper if the resulting exchange is not on *fair* terms”); § 184, “When Rest of Agreement is Enforceable” (“reasonable standards of *fair* dealing”); § 190, “Promise Detrimental to Marital Relationship” (“*fair* in the circumstances”); § 195, “Term Exempting from Liability for Harm Caused Intentionally, Recklessly or Negligently” (term unenforceable unless “*fairly* bargained for”); § 205, “Duty of Good Faith and Fair Dealing” (pervasive duty of “good faith and *fair* dealing”); § 223, “Course of Dealing” (“*fairly* to be regarded as establishing a common basis of understanding”); § 243, “Effect of a Breach by Non-Performance as Giving Rise to a Claim for Damages for Total Breach” (such impairment of value of contract to injured party “that it is *just* in the circumstances to allow him to recover”); § 260, “Application of Payments Where Neither Party Exercises his Power” (“*just* regard to the interests of third persons, the debtor and the creditor”); § 272, “Relief Including Restitution” (if other apposite rules “will not avoid *injustice*, the court may grant relief on such terms as *justice* requires”); § 351, “Unforeseeability and Related Limitations on Damages” (“court may limit damages . . . if it concludes that in the circumstances *justice* so requires”); § 354, “Interest as Damages” (“interest may be allowed as *justice* requires”); § 358, “Form of Order and Other Relief” (“order of specific performance . . . on such terms as *justice* requires”); § 371, “Measure of Restitution Interest” (measurement of restitution interest “as *justice* requires”); § 384, “Requirement That Party Seeking Restitution Return Benefit” (compensation in place of return of property in restitution “if *justice* requires that compensation be accepted”) (emphases added throughout).

286. See RESTATEMENT (SECOND) OF CONTRACTS (1981). For example, § 348, “Alternatives to Loss in Value of Performance,” (when cost of breach is not adequately proved party may recover cost of completing performance or remedying defects “if that cost is not clearly *disproportionate* to the probable loss”); § 229, “Excuse of a Condition to Avoid Forfeiture” (court may excuse the nonoccurrence of a condition “to the extent [it] . . . would *cause* disproportionate forfeiture”); § 237, “Effect on Other Party’s Duties of a Failure To Render Performance” (“*condition* of each party’s remaining duties [is] . . . that there be no uncured material failure by the other party”); § 241, “Circumstances Significant in Determining Whether a Failure Is Material” (listed circumstances advise on “*whether* a failure to render or to offer performance is material”) (emphases added throughout).

287. As Professor Greenawalt has noted, “[s]trict deontological and strict consequentialist approaches may have a kind of theoretical purity that is lacking in a mixed account; but it would be mistaken to dismiss the latter as incoherent.” R. Kent Greenawalt, *Violence—Legal Justification and Moral Appraisal*, 32 EMORY L.J. 437, 456 (1983).

For example, the tort-based statute applied in *Peevyhouse* contained a consequentialist element—“no person can recover a greater amount in damages for the breach of an obligation than he would have gained by the full performance thereof”—as well as a deontological element—“where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice no more than reasonable damages can be recovered.” *Peevyhouse v. Garland Coal & Min. Co.*, 382 P.2d 109, 113 (Okla. 1963) (quoting an Oklahoma statute). Under the *Peevyhouse* court’s application of this statute, the remedy sought by the plaintiffs was “unconscionable and grossly oppressive damages, contrary to substantial justice . . . . Also, it can hardly be denied that if plaintiffs here are permitted to recover under the ‘cost of performance’ rule, they will receive a greater benefit from the breach than could be gained from full performance.” *Id.* (quotation omitted).

reach the same or very similar conclusions,<sup>288</sup> it is not always clear which perspective informs a particular result.<sup>289</sup> Only when the doctrine is construed in terms of concrete context can we begin to decide which normative theory is determinative or, even, plausible.

The foregoing should not be taken as nihilism. Contract is not immoral or even amoral. It is probably better to conclude that Contract is “omni-moral,” to coin a term. Contract adjusts to the normative light that surrounds the context, and is in that way normatively “chameleonic.” Does that mean that Contract is no more “than the largely random result of historical and political accidents”?<sup>290</sup> Well, yes, in a way you could say that. But the same might be said of us all, and of all things normative.

### CONCLUSION

Abundant intellectual and scholarly energy has been expended in the effort to “discover” a theory of Contract. I do not conclude that that energy has been wasted; I do conclude that it has generated more heat than light. This piece has surveyed, summarily, the Contract theory terrain and has found sufficient irregularities to frustrate the smooth navigation of any of the alternatives. Contract just will not stay in the boxes we would have cabin it, and that is true no matter how we try to combine the boxes.

From those premises it becomes clear that more important than further pursuit of foredoomed efforts to vindicate the moral integrity (or even coherence) of Contract is sustained attention to the reasons why Contract resists the neat imposition of a normative template. This article has endeavored to begin that more important discussion in earnest. If the preliminary observations and conclusions offered here gain any traction it would have to be because they provide us the means to recalibrate our conception of the possible, to look in the right places for what we can find rather than continuing the search where the light may seem better, but where the answer cannot be found.

Contract is an amalgam; it defies simple reduction, heuristic reduction, into accessible theoretical terms. The reason for that is largely because of the nature of Contract doctrine and because theoretical analysis *cannot* yield the results we would have it yield. The deck is stacked against the endeavor. But there is nothing about that conclusion that is nihilistic: Contract has a rich texture, too rich a texture to reduce as ex-

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288. Many have argued that the two perspectives do not—cannot—exist in isolation. *E.g.*, RAWLS, *supra* note 61; Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 77, 82–87 (1973).

289. See Alces, *supra* note 3, at 1553–56 (discussing Judge Easterbrook’s opinion in *ProCD*).

290. Contracts Prof. Weekly Spotlight: Nathan Oman, [http://lawprofessors.typepad.com/contractsprof\\_blog/contracts\\_profs\\_weekly\\_spotlight/index.html](http://lawprofessors.typepad.com/contractsprof_blog/contracts_profs_weekly_spotlight/index.html) (last visited Oct. 2, 2007).

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tant theories would have it reduce. We should start over, and should proceed with the caveat offered by this article firmly in mind.

